Supreme Court, U.S.
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Supreme Court of the United States

..................................Term, 1980

No. **79-1817**

In the Matter of
THOMAS R. NELIPOWITZ, Esq.,
Petitioner

v.

THOMAS K. CHRISTO, Esq.,
ROBERT G. WATSON, Esq.,
THE F. & M. SCHAEFER CORPORATION,
THE F. & M. SCHAEFER BREWING COMPANY,
ELECTRONIC DATA SYSTEMS CORPORATION,
and E.D. SYSTEMS CORPORATION,
Respondents

THE F. & M. SCHAEFER CORPORATION et al,
Original Plaintiffs

ELECTRONIC DATA SYSTEMS CORPORATION et al,
Original Defendants

Docket No. 79-7932

In the United States Court of Appeals (Second Circuit)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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28 U.S.C.A.1254(1); 28 U.S.C.A. 1651;
28 U.S.C.A. 1652; N.Y. JUDICIARY L.
Sections 470, 474, 475, 478, 484 & 491;
U.S.D.C. S.D.N.Y Rules 3(a), 4(a) & 4(c)

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2. The Federal Courts below have violated Nelipowitz's Constitutional Rights. 22

3. By dismissing Nelipowitz's Petition with prejudice as to client plaintiffs Schaefer, defendants EDS and Attorney Watson and failing to follow New York law the Federal Courts below failed to comply with the Federal Conformity Law (28 U.S.C.A. 1652) and violated Nelipowitz's rights of equal protection and due process under the Constitution. 22

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4. By Dismissing Schaefer, EDS and Watson *with prejudice* the Opinion below committed totally irreconcilable error and breached the Federal Conformity Law thereby failing to give Nelipowitz equal protection and due process under the Constitution. 28

5. Nelipowitz is an equitable assignee *pro tanto*. The Opinion is inconsistent with the Second Circuit's own prior opinions in *Walker* and *Woodbury* and this Court's Opinion in *Barnes* and the New York cases of *Harwood, Archibald and LaFetra* and the *Delval* case in Massachsetts................ 36

6. On the facts at bar the Opinion's claim that the lien runs to the Christo firm and not to an associate *of* that firm is in error, is not supported by *Entertainment and Amusements*, the only cited authority, and is contrary to New York law and public policy and to the Federal District Court's own rules. 39

7. The Opinion's claim that an "Of Counsel" allegation is insufficient is substantively contrary to *Roskind* on which it relies, and to the actual allegations and admitted facts on the record, and wholly unsupportable in New York law or on the facts of this case. 45

8. The law of New York concerning attorney retention arrangements does not depend on labels such as direct, indirect, co-counsel, assistant counsel, attorney of record, trial counsel or any other label alleged. In New York retention arrangements (and client liability) depend soley on the attorney's *authority* to do the act in question (or his ability to prove that authority). 50

8A. The theory of the Opinion that the New York courts have imposed a "direct retention" rule on the lien statute is not true. The governing compensation and lien statutes are plain and clear. Said theory of the

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Opinion is contrary to New York law as declared by the New York Court of Appeals. Under New York law, as so declared, it is not important that an attorney show the agreement with the client was made directly provided he was employed pursuant to an agreement made with the client's *authority*. The New York remedial statutory lien statute must be construed liberally [for the benefit of attornerys]. Schaefer, a client must, but did not here, allege that Petitioner was not the Attorney of Record or lacked authority to appear or that the Joint Retainer Agreement was excessive, or obtained by mistake, false representation or undue advantage or that Petitioner Nelipowitz lost his authority to appear, or that he waived his lien or that the statutory "proceeds" do not exist. Thus, Schaefer never alleged any proper ground, other than the purely factual issue of purported *non*-retention which has never been litigated, on which to dismiss the Petition of Petitioner Nelipowitz as against Schaefer. Neither the New York courts, nor the Federal Courts below which must comply with New York law, may in the absence of proof a fee agreement was improperly obtained, disregard it. Federal Courts are obliged to follow state law. 28 U.S.C.A. 1652. 50

8B. The Opinion fails to follow N.Y. Jud. L. §§474 and 475, *Harwood, Sargent, Robinson* and *Kelly* because it is factually erroneous, because Nelipowitz was jointly retained and had clear authority to appear, fails to recognize that a compensation agreement may be express or implied, that retention authority and authority to appear are not the same or to recognize the distinction between agreements permitted under §474 from the lien that arises under §475, and that the statutory charging lien does not spring from the contract, but rather from the statute and secures the compensation. In New York *retention need not be direct.* The Opinion is contrary to three different

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N.Y. Court Of Appeals cases, §§475 and 474 and *Kelly* (In addition to the *Fischer-Hansen, In Re Niagra, L. O. Power Co.* and *Beecher* errors discussed in Points 4, 9, 10 and 11, all in violation of the Federal Conformity Law. (28 U.S.C.A. 1652.) 55

8C. The Opinion's interpretation of *Roskind* is clearly erroneous. *Roskind* and *Harwood* are consistent both with each other and the New York rule that client liability depends solely on the attorney's *authority* to do the act in question (and be able to prove that authority). 60

8D. The Opinion misapplied the "Trial Counsel" rule, so called, and failed to squarely address any of the three distinct authority issues on which Nelipowitz's authority is clear. 68

9. The actual fee due to "the attorney" under the Joint Retainer Agreement was not $341,667 (as only out-of-state attorney Christo actually claims) but in the range of $1,198,800 to $ 2, 2530,000 and in no event lower than $775,000.000. In New York, in computing the attorney fee due on settlement the statutory lien and equitable assignments attach to the "proceeds", i.e., to the amount agreed upon in settlement, *when made.* New York law bars the subordination of attorney fees to set-offs, counterclaims or other separate transactions between the parties to the suit in the event of a statutory lien or an equitable assignment. The Opinion below failed to articulate and made two errors as to the primary facts at issue. The Opinion erroneously states "client has paid the attorney it retained" and failed to take Petitioner's allegations as true. In-state client Schaefer never properly paid in-state Petitioner attorney Nelipowitz or out-of-state attorney Christo, who are "collectively referred to as "the attorney". Schaefer was obliged to pay "the attorney" so defined. Page 1 of the Schaefer-Christo "Fee Adjustment

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Agreement" of May 26, 1978 (A-21) is a subterfuge. The real net amount Schaefer recovered to which Petitioner's statutory lien, and the equitable assignment of the jointly retained attorneys attached upon settlement on May 26, 1978 is in the range of 3.6 to 7.6 million dollars, and is, in any event not less than 2.3 million dollars. The amount due Petitioner is in the range of $ 90,000 to $190,000 and in no event lower than $58,125.00. The courts below by failing to take Petitioner's allegations as true thereby failed to properly consider the rule barring subordination of attorney liens and equitable assignments thereby also violating the Federal Conformity Law 74

9A. Schaefer's real recovery was in the range of 3.6 to 7.6 million dollars and in no event less than 2.3 million dollars. The fee due to "the attorney" on the properly computed Settlement Amount was in the range of $ 1,198,000 to $2,530,000. 77

9B. For the reasons previously and hereinafter set forth "[T]he [A]ttorney's" fee due was in the range of $1,198,000 to $2,530,000 and in no event less than $775,000. The May 26, 1978 "amendment" is a subterfuge and covers up the real net amount (as defined) that Schaefer recovered. 85

10. Entirely apart from Schaefer, Christo and Watson, Nelipowitz has independent rights against Defendants EDS. Notwithstanding the form of the District Court opinion, EDS did not appear in the ancillary proceeding in either Court below. Defendants EDS were under a duty to protect Petitioner's Lien and are presumed to have retained sufficient to pay the amount due under Petitioner's Lien under New York law. Nelipowitz has New York statutory and other property and remedial rights that he was deprived of without a hearing by the Federal Courts below. The Federal Court Opinion is erroneous and prejudicial to Nelipowitz's

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numerous rights against EDS under and contrary to N.Y. Jud. L. §474 and 475, *Fischer-Hansen, Sargent V. McLeod* and *Robinson v. Rogers* because it judicially modifies the statute, retroactively, and is also squarely contrary to *Harwood's* rule that retention need not be direct and completely fails to follow and apply New York law as declared by New York statute and by the New York Court of Appeals and also thereby violated the Federal Conformity Law 28 U.S.C.A. 1652 and Nelipowitz's right to equal protection and due process under the Constitution, and was otherwise both prospectively and retroactively prejudicial to Nelipowitz's rights against EDS. 91

10A. EDS was properly named as a Respondent but never appeared but was nonetheless dismissed with prejudice as to Nelipowitz on a factual issue EDS could have but never raised.......................... 92

10B. Dismissal with prejudice against EDS is contrary to two New York Judiciary Law Sections 474 and 475 and four leading N.Y. Court of Appeals cases and New York's "double protection" public policy against settlements made without the knowledge of the lien holders knowledge. 94

10C. By proceeding with a Statutory Petition Nelipowitz did not waive his other cumulative rights under New York law, e.g. *Citizen's Bank* and *Fischer-Hansen*. 97

10D. The Opinion both standing alone and coupled with the failures of the Courts below to compel production of true copies of key documents missing from the Dristrict Court further prejudices Nelipowitz's rights under New York law both placing him into a *Coughlin* situation, retroactively after he did what is required under N.Y. law to enforce the statutory lien, and then leaves him without remedy to obtain the missing documents necessary to show

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that EDS had knowledge of Nelipowitz's compensation rights. 98

11. The decision below is not a true dismissal without prejudice against Christo as purported (A-7). 102

12. The Opinion did not, as it purports to do, take Petitioner's allegations as true and thereby failed to grant Petitioner "due process". 105

13. For the reasons set forth this case raises an important public policy question on facts that could occur in any law suit in any Federal Court but which is, in any event, if only because of the volume of litigation, of importance in New York, the Second Circuit and especially in the Southern District of New York which requires that this Court review, and exercise its supervisory powers over, the judicial policy of the Second Circuit as to the Question Presented in this Point. 108

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Supreme Court of the United States

..................................Term, 1980

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Docket No. 79-7932
In the U.S. Court of Appeals (Second Circuit)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review a judgment and order rendered by the United States Court of Appeals for the Second Circuit, on November 2, 1979 and finally entered on December 18, 1979 (upon denial of Petitioner's Petition For Rehearing) and which affirmed "substantially" the Opinion of the Hon. Constance Baker Motley of the U.S.D.C. S.D.N.Y. on March 16, 1979. Petitioner further prays that this Court compel the Federal Courts below to comply with the Federal Conformity law (28 U.S.C.A. 1652).

OPINIONS BELOW

The Opinions of the United States Court of Appeals for the Second Circuit (Br. App. p. A-9) and of the United States District Court for the Southern District of New York (Br. App. A-2-8) have not yet been reported. Said Opinions together with all of the Judgments below are, unless the context otherwise requires, referred to herein in the singular as the Opinion.*

JURISDICTION TO REVIEW

Diversity Jurisdiction of the United States District Court for the Southern District of New York was initially invoked in the main action, now closed, by Plaintiffs Schaefer solely under 28 U.S.C. 1332. This case arose as an ancillary proceeding pursuant to a Petition under N.Y. Jud. L. Sec. 475 (entitling a New York attorney to petition for a determination as to the value of his statutory charging lien and to enforce said lien.)

The Judgment to be reviewed was rendered and entered on November 2, 1979. A Petition For Rehearing was denied on December 18, 1979 (Br. App. p. 10, 11). Following its denial the Court of Appeals granted Petitioner's December 14, 1979 Motion For Leave To File Supplemental Brief on December 26, 1979 (Br. App. p. 12) but denied Petitioner's January 2, 1980 Motion For Leave To File Petition For Reconsideration In Banc on March 17, 1980.(Br. App. p. 11). The Court of Appeals denied Petitioner's March 11, 1980 Motion To Recall Mandate on May 5, 1980.

The Supreme Court of the United States entered an Order on March 24, 1980 extending Petitioner's time to file a Petition For A Writ Of Certiorari to May 16, 1980 (Docket No. A-813).

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*A copy of the Record Appendix in the U.S. Court of Appeals has beeen lodged with this Court. All "A" citations in this brief are to those page references. However, the Appendix to this Brief has been correlated therewith and any reference to A-3 through A-7 may be found in either the Appendix to this Brief or in the Court of Appeals Record Appendix.

Jurisdiction is granted to the Supreme Court under 28 U.S.C. Section 1254(1). Alternatively, and in lieu of a separate petition which would merely duplicate the issues raised herein the Supreme Court has statutory and constitutional question jurisdiction under 28 U.S.C. 1651 and *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) because the Federal Courts below failed to comply with the Federal Conformity Law (28 U.S.C. 1652), and dismissed *with prejudice* as to five Respondents and other unrecognized prejudice as to the first Respondent (Christo) without a hearing and without taking Petitioner's allegations as true.

QUESTIONS PRESENTED

A principal question for decision is whether Federal Courts, without contravening the Constitution, can in apparent effect transfer, and preclude a New York attorney from enforcing, a *statutory* lien which rests on the *appearance* of the in-state New York attorney who appeared on behalf of the in-state client in the Federal District Court for the Southern District of New York, to an out-of-state Massachusetts law firm having one member who was not admitted to either the New York bar or to said Federal Court when the New York attorney was never a member, partner, associate, or otherwise a part of the Massachsetts law firm and was merely "of counsel" *to* the Massachusetts law firm generally and associated *with* that firm, pursuant to a Joint Retainer Agreement that according to Respondent out-of-state attorney provides that the "client[s] hereby agree to retain ... attorneys ... (hereinafter referred to collectively as 'the attorney') . . . ." contrary to the public policy of New York and in contravention of the Rules of said Federal Court that expressly provide "Only an attorney or proctor of this Court may enter appearances..." when the in-state New York client's claims in the main action rested exclusively on diversity jurisdiction as to *state* claims and involved *no federal* question, and do so by both claiming the New York statutory lien under local New York law "would run to the [out-of-state] law firm retained by the client and not to the associate *of* that firm" (A-6) and when, notwithstanding the Opinion below (*Id*), and on the Record here, both the out-of-state attorney and the in-state New York attorney agree that the in-state New York attorney was never a partner, member, associate or a part of the out-of-state one man law firm and by plainly refusing to address patent violations of the Rules of the Federal Court itself that should have, standing alone, protected the compensation due to the in-state attorney from the in-state New York client, and when said Rules were violated by the in-state client's other attorneys including the out-of-state attorney?.

May the Federal Courts below in effect apparently transfer the statutory charging lien of an in-state New York attorney who appeared in the Federal District Court to an out-of-state (Massachuetts) law firm which did not have an associate or partner admitted to practice in either New York or said Federal Court when the out-of-state law firm could not appear under the law of New York or the Rules of the Federal Court for the Southern District of New York, and also holds at least some admitted part of the "proceeds" that the New York attorney is entitled to follow into the hands of whosoever holds them and when the sole capacity of the out-of-state Massachusetts lawyer to practice in the particular Federal Court rested exclusively on the Motion by the in-state New York Attorney of Record Petitioner after had he appeared?

Assuming *arguendo* on facts contrary to the Record before the Court that Petitioner was "indirectly retained" may a Federal Court deprive a New York attorney of his statutory charging lien under New York law on the purported theory that a petitioner must not only show that he was attorney of record but must also have been directly retained by the client when the New York Court of Appeals has expressly declared "It [is] not important for the [sub-retained attorney] to show that the agreement was made *directly* with the [clients]. . . . It [is] sufficient that he was employed under the agreement made with. . .*authority*. . .(emphasis supplied)?

May a Federal Court dismiss an Attorney of Record's Statutory Petition to Determine and Enforce his Statutory Lien under New York law *with prejudice* as to the client when the Attorney of Record is also an equitable assignee pro tanto pursuant to an agreement which provides "client further agrees to pay the attorneys (hereinafter collectively referred to as 'the attorney'] in the event of affirmative recovery, settlement or execution . . . (33 1/3%) of the net amount received by the client . . ."?

May a Federal Court without a hearing of any kind, in a contingent fee dispute with the in-state client and the client's other out-of-state attorneys, deprive an in-state New York Attorney of Record who initiated a New York statutory ancillary proceeding to Determine the value of and to Enforce his statutory charging lien on the proceeds in accordance with both New York law and the law of Federal Forum of his choice as against the Plaintiff in-state New York clients, the clients' out-of-state Massachusetts *pro hac vice* admitted lawyer, and his out-of-state former associate and current partner(who also allegedly worked on the case either with or without *pro hac vice* admission), who at the time of the filing of the Petition (and now) were both practicing law from the same address in New Hampshire and either of whom may or may not be residents of Massachusetts, and against the Texas Defendants in the action, when the Federal Forum of his choice is the very Federal District Court forum in which the main action occurred and in which the New York attorney is the acknowledged Attorney of Record who appeared, moved the *pro hac vice* admission to said Federal Court of said first out-of-state attorney who also represented the New York clients, and, who following a settlement between Plaintiffs and Defendants made without the Attorney of Record's knowledge, also amended, without his knowledge, the contingent fee agreement which had been executed on the day the in-state New York lawyer appeared for the Plaintiffs thereby subordinating the agreed fee to certain transactions between Plaintiffs and Defendants contrary to New York law?

May Federal Courts dismiss an ancillary proceeding Statutory Petition by an Attorney of Record to determine and enforce his Statutory lien as against the Defendants in the main action *with prejudice* either when the New York Court of Appeals has previously expressly ruled both that the law conclusively assumes that a defendant retains sufficient to pay the fee and that defendants are under a duty to ascertain the amount due to the Attorney of Record, or when the Defendants themselves did not appear in the ancillary proceeding and also claimed in both of the Federal Courts below only that they were not properly before either court, or both?

Are Federal Courts free to disregard violations of the express Rules of the applicable Federal District Court by the in-state-plaintiffs' other attorneys, which violations had the obvious effect of preventing the acknowledged Attorney of Record from enforcing his equitable assignment, his common law retaining lien or his common law charging lien rights?

Are the Federal Courts below free to fail to apply the pronouncement of the highest court of New York that it is irreconcilably inconsistent for a client to both deny an attorney was retained and simultaneously without litigating that issue sue to possess its papers, to this "mirror image" case in which the client obtained, without litigating the retention issue, an unqualified "with prejudice" dismissal of the Attorney of Record's Statutory Petition to enforce his Statutory Lien when the client claimed that Petitioner was *not* retained but the District Court said the attorney must show that he was *directly* retained contrary to still another New York

Court of Appeals case holding retention need not be direct and the agreement need only be made with authority and where the agreement executed by the clients expressly provides that "the client[s]' hereby agree to retain ... [X] ..., and such other attorneys as he may choose to associate with him, (hereinafter referred to collectively as 'the attorney') for the purposes of performing legal services ...."?

May Federal Courts disregard the pronouncements of the highest court of New York that bar subordination of either a statutory charging lien or an equitable assignment to set-offs, counterclaims and other separate transactions bewteen the parties to the action in computing the fee due?

May a Federal Court erroneously claim that the issue at bar is whether the [New York] attorney is entitled to the lien when the law of New York expressly declares the lien arises at the commencement of the action by appearing and further declares the proceeding is not to establish the lien but to have the court determine the amount [and to enforce the lien] when the in-state New York client never claimed that the New York attorney lacked authority to appear?

May a Federal Court erroneously and without any substantiation claim that New York courts have imposed a "second requirement" ... [i.e. "direct retention"] for the enforcement of a *statutory* lien when in New York law and in fact no New York court has ever so held?

May Federal Courts in the absence of any hearing on the merits disregard a Petitioner's allegations that directly controvert erroneously assumed facts appearing in the Opinion? In short must the Federal Courts below take Petitioner's allegations as true?

When New York law provides its attorneys with a statutory right to petition [for an equitable ancillary proceeding] to determine the value of, and to enforce his statutory charging lien that arises upon his*appearance*, may a Federal Court, purportedly determining New York law, and without granting an evidentiary hearing of any kind on the disputed facts rule that the New York statutory lien would run to the very out-of-state law firm against whom, among others, the New York attorney sought to enforce his lien rights, including the right to follow the proceeds when that same statute both sets forth his lien rights and permitted him to petition, dismiss the Petition *with prejudice* as against the other parties who do or may hold the statutory "proceeds" including an associate or partner of said out-of-state law firm, the in-state New York clients for whom the New York attorney appeared, and defendants liable to the New York attorney because of their actual or constructive notice of the New York attorney's rights in accordance with New York law and who also claim, possibly correctly, that it never properly appeared in the ancillary proceeding, and further may said Court *purportedly dismiss the Petition without prejudice* to litigating the New York lawyer's claims for compensation in other fora against one personally and individually named partner of the said out-of-state law firm [who was the sole person in the one man firm at the time of the New York attorney's appearance] but seems to nontheless rule that the New York lawyer cannot follow the statutory proceeds into the hands of any third person to whom that out-of-state law firm or the indiviually named attorney did or might transfer the statutory proceeds (including one of the other multiple equitable assignees) when under New York law the attorney who appears may follow the proceeds "in whatever hands they may come" and further sets forth at least three other property rights arising out of the New York statutory lien including secured rights of compensation, by agreement or by quantum meruit, and the right to a summary equitable proceeding to determine the lien value, and to enforce it, *in addition; to other remedies under New York law?*

CONSTITUTION, STATUTES AND RULES INVOLVED

U.S. Constitution. Amendment XIV (Equal Protection and Due Process)

28 U.S.C.A. 1254(1) (Certiorari)

28 U.S.C.A. 1651(1) (Extraordinary Writs)

28.U.S.C.A. 1652 (Federal Conformity Law)

N.Y. Judiciary L. Section 470 (Offices of New York Attorneys)

N.Y. Judiciary L. Section 474 (Attorney Compensation Agreements)

N.Y. Judiciary L. Section 475 (Attorney Liens)

N.Y. Judiciary L. Section 478 (Practicing or Appearing Without Being Admitted)

N.Y. Judiciary L. Section 484 (None But Attorneys To Practice)

N.Y. Judiciary L. Section 491 (Division of Fee Agreements)

U.S.D.C. S.D.N.Y. Rule 3(c) (No Appearances or Stipulations By *pro Hac Vice* Attorrneys

U.S.D.C. S.D.N.Y. Rule 4(a) (Offices Required of [Admitted] Attorneys Practicing in the Southern District of New York)

U.S.D.C. S.D.N.Y. Rule 4(c) (No Substitution Without Order)

Disciplinary Rule DR-2-102 (Regarding "Of Counsel" Relationships and Letterheads)

Disciplinary Rule DR 2-107 (Division of Fees Among Lawyers)

The foregoing Constitutional, Statutory and Rule provisions are set forth in the Brief Appendix immediately following Br. App. pp. A-1 through A-12).

SUMMARY OF ISSUES

The cardinal issue on appeal is the unqualified, and unlawful, dismissal of Petitioner Nelipowitz's Statutory Petition to Determine and Enforce his Statutory attorney charging Lien *with prejudice* as to five (5) Respondents-Appellees: Plaintiffs-clients Schaefer (2), defendants EDS (2) and "co-counsel" Watson, and a purported but erroneous "without prejudice" dismissal of Respondent Christo. The District Court Opinion below and the November 2, 1979 Order of the Court of Appeals for the Second Circuit affirming same "substantially" (which shall hereinafter be referred to together with the respective Judgments, unless the context otherwise requires, as the Opinion) must be reversed for the reasons that follow.

The Opinion exceeds on numerous grounds, and in contravention of the Federal Conformity Law (28 U.S.C.A. 1652) and unconstitutionally, the powers of Federal Courts contrary to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945). This is so because Nelipowitz appeared *with authority* to do so (and Schaefer never claimed he did not have authority to do so) and thus held the Statutory Lien (including an additional statutory remedial right to petition to determine and enforce the lien) in addition to other provisions of local law *which were not waived* by Petitioner). Further, regardless of whether Nelipowitz is a statutory lienor under N.Y. Jud. L. Section 475, he is also clearly an equitable assignee *pro tanto* under the law of this Court *Barnes v. Alexander*, 232 U.S. 117 (1914), and of New York *Harwood v. LaGrange*, 137 N.Y.538 (1893); *Archibald v. Panagolopoulos*, 233 N.Y. 478 (1922), and of Massachusetts *Delval v. Gagnon*, 213 Mass. 203 (1912) and of the Court of Appeals for the Second Circuit *Walker v. Hartford Realization Co. Inc.*, 74 F.2d 56 (C.A. 2 1934); *Woodbury v. Andrew Jergens Co.*, 69 F.2d 49 (C.A. 2 1934).

The Federal Courts below failed to follow New York law as declared by New York's statutes N.Y. Jud. L. Section 475 (that the attorney who appears has the statutory charging lien) and Jud. L. Section 474 (an attorney's or counselor's compensation agreements are unrestrained by law).

In addition the Federal Courts below failed to follow the law as declared by the highest court of New York *contrary to* (i) *Harwood v. LaGrange, supra* (even a sub-retained attorney has an equitable assignment and need not be directly retained to bring an action against the client), and to (ii) *Robinson v. Rogers*, 237 N.Y. 467, 472 (1924) and *Sargent v. McLeod*, 209 N.Y. 360, 365 (1913) (the lien springs from the statute and not the contract and the lien secures the compensation) and to (iii) *Application of Peters*, 271 App. Div 518 (3d Dep't 1946) aff'd 296 N.Y. 974 (N.Y. 1947); *Fischer-Hansen v. Bklyn. Hts. R.R. Co.*, 173 N.Y. 492 (1903) the proceeding is to determine the value and enforce it and to (iv) *Beecher v. Vogt Manufacturing Co.*, 227 N.Y. 468 (1920) (because the statutory lien and equitable assignment both attached on September 7, 1976 and they cannot be affected by any settlement, set-off or other separate transaction between the parties to the action) and to (v) *Fischer-Hansen and Sargent supra* (a defendant must inquire as to the amount Plaintiff's attorney is entitled to receive and is conclusively presumed to have retained sufficient to pay him and EDS did not do so), and to (vi) *In Re Niagra, L. & O. Power Co.*, 203 N.Y. 493 (1911) (it is irreconciliably inconsistent to simultaneously claim an attorney client relationship does not exist and maintain a proceeding to recover papers. [Here the Opinion's irreconcilable inconsistencies include, among other things, simultaneously ruling that Nelipowitz did not have a lien under the first sentence of, but nonetheless dismissing his Petition made under the second sentence of the very same statute, *with prejudice*, as to five respondents (and with apparently unintentional but actual prejudice as to the sixth respondent) when the clients claimed *non*-retention and the District Court claimed Nelipowitz must show *direct* retention, and which the Record shows he did, as a jointly retained attorney.

The Opinion must also be reversed not only because it dismisses defendants EDS with prejudice contrary to *Fischer-Hansen, supra* (as above) but because EDS itself claims (See letter cited Br. App-1, item 6) it was never properly before either court below and because even if Nelipowitz were not the Attorney of Record holding the Statutory Lien the Federal Courts below still apparently failed to protect his rights to proceed against Schaefer (and Watson) pursuant to or for interfering with his equitable assignment (*Harwood, supra,*) by means of the other remedies available to him. See eg. *Citizen's Bank of White Plains, N.Y. v. Oglesby, 270 App. Div. 136 (N.Y. App. Div. 2d Dep't 1945).*

The Federal Courts below further failed to grant Nelipowitz either equal protection under or due process under the laws by failing in numerous respects to take Nelipowitz's allegations as true without any trial or evidentiary hearing of any kind contrary to *Radovich v. National Football League*, 352 U.S. 445 (1957); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967); and the Second Circuits's own prior decision in *Walker, supra* and thereby refused to address, inter alia, both the primary issues of fact in this case which are not articulated in the Opinion and to properly apply New York law as declared by its highest Court in *Beecher, supra.*

In a case that involved no federal claim by the client that might somehow justify a "federal" variation and a stretching of New York's rules, such as occurred in *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (C.A. 2 1965 on reconsideration in banc 1966) cert. den. 385 U.S. 987 (1966) the Federal Courts below refused to address at least two different Rule breaches by Schaefer's other attorneys in, and at the time of settlement of the main action, which were the root cause of this ancillary proceeding case, and then proceeded in the very forum in which they occurred to deny a hearing to the Attorney of Record who not only alleged them (A-38, par. 14,15; A-43, par.25) but thereafter documented same on the Record (R-237, R-238, S.D. Rules 3(c) and 4(c) and in a federal forum in a case caused by a contravention of said pre-existing federal policy as declared by that forum.

Part of the reason for that error was rationalizing its decision on the basis of dicta in a lower N.Y. court case (*Entertainment & Amusements*) that does stand for "the associate *of*" principle enunciated, and uncontroverted here because it is inapplicable to the facts at bar. More importantly that case did not deal with the public policy issues arising from in- and out-of-state attorney collaboration. Further, another New York case (*Rosenberg*) did address that New York public policy and it was decided after the Opinion below. See Points 6 and 13.

The Opinions below are inconsistent with the Second Circuit's own prior opinions in *Walker, supra* and *Woodbury v. Andrew Jergens & Co.*, 69 F.2d 49 (C.A. 2 1934) and the opinions of this Court in *Barnes v. Alexander*, 232 U.S. 117 (1914) and in *Erie Railroad Co. v. Tompkins, supra* and *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945).

The property rights of an attorney are controlled by state law. *In Re Washington Square*, 5 N.Y.2d 300 cert. den. 363 U.S. 841 (1960); *DeLaPaz v. Coastal Petroleum Transport*, 136 F. Supp. 928 (D.C. S.D. N.Y. 1955); *In Re Mayfair Construction Co.*, 170 F. Supp. 657 (D.C. N.J. 1959).

The Opinions and Judgments below is substantively and legally inconsistent with the Second Circuit's Judgment in *Spanos v. Skouras Theatres Corporation*, **364 F.2d 161 (C.A.2 1965) on recon. in banc 1966 cert. den.** 385 U.S. 987, 87 Sup. Ct. 597 (1966).

STATEMENT OF THE CASE

INTRODUCTION

In one sense this is a very easy case that merely involves a failure of the Federal Courts below to make a determination of and to enforce the Attorney of Record's lien in accordance with New York law. The case arose out of an in-state-lawyer collaborating with an out-of-state lawyer pursuant to a Joint Retainer Agreement covering multiple assignees pro tanto and concerning the in-state clients' state claims in a diversity action. The Federal Courts misappplied New York law in numerous respects thereby violating the Federal Conformity Law and Petitioner Nelipowitz's Constitutional rights to equal protection and due process. If this Court desires, the case can be reversed on narrow grounds such as the irreconcilable error below (See Point 4) or the squarely verbatim conflict of the Federal Opinion below concerning direct and indirect retention as compared with the law of New York as declared by the New York Court of Appeals in the landmark *Harwood* case.

On the other hand if the Federal Courts below are no longer required to comply with the Federal Conformity Law then this Court must consider the source of the powers of Federal Courts in diversity actions containing no federal claims to, in effect, extinguish all of the local law property rights of an in-state Attorney of Record as against the in-state client and its out-of-state law firm and to transfer his New York statutory lien to said out-of-state law firm (that was not admitted to practice in either New York or the Federal Court where the diversity action took place) which, along with other attorneys of the in-state client, signed Stipulations contrary to the Federal Court's own rules thereby also permitting the out-of state Defendants to escape, short of remedial action by this Court, New York's "double protection" policy concerning the remedial New York statutory charging lien (as compared with its weak sisters, the common law retaining and charging liens).

The Federal Opinion below is, in terms, and even on the erroneous facts it assumes, in conflict with a recent New York case that sets forth the minimal requirements under New York law and public policy for, under any circumstances, an out-of-state law firm to appear in a New York court. On the actual facts of this case, including Respondent Christo's own sworn statements, the Federal Opinion below is completely contrary to New York Public Policy.

The main case out of which this ancillary case arose concerned an allegedly defective computer software system developed by and operated for Schaefer of New York, by EDS of Texas, without which Schaefer could not operate (R-41 *and* 306 — the *Replevin Hearing Transcript* — hereinafter RT, p. 617,619). The main action was an extra-ordinary multi-dollar case involving multiple theories of liability and defense between substantial business entities based on state, not federal, law claims.

FACTS

The alleged and incontrovertible facts of this ancillary case are as follows. Prior to June 7, 1976 Nelipowitz, a New York Attorney, and Christo of Massachusetts, agreed to and did thereafter work on the preparation of and litigation of Schaefer's case against EDS for a one-third (33-1/3%) contingent fee to be divided on the basis of hours worked. Nelipowitz was to be the Attorney of Record unless Schaefer chose other local counsel which it did not do. If other local counsel were chosen by Schaefer the contingent fee to be paid by Schaefer was to be forty per cent (40%). Schaefer instructed that Nelipowitz be local New York counsel on or about August 29, 1976.

On September 7, 1976 Nelipowitz *appeared* at the District Court and became Attorney of Record. More or less contemporaneously a Joint Retainer Agreement covering all of Schaefer's attorneys who were "collectively referred to" therein as "the attorney" (A-12) was executed by Schaefer and Christo at Schaefer headquarters. (Schaefer voluntarily failed to meet two conditions necessary to continue to possess and use the EDS system, and also failed to disclose material adverse information to Christo which was subsequently discovered by EDS and which caused a Spring 1977 separate transaction in which Schaefer paid EDS 1.3 milion dollars. The actual agreement surrounding Schaefer's then limited property right purchase in the EDS system has not been disclosed. However, Nelipowitz alleged that by reason of that transaction Schaefer acquired a limited property right "for the duration of this action")(A-40, par. 18).

On November 9, 1976 EDS filed its Answer and Counterclaims. The Second Counterclaim related to Schaefer's then current 1.3 million dollar 1976 debt due to EDS (purportedly due as a "termination" or "cancellation" payment) but which actually consisted of previously deferred operating and development costs. The remaining EDS Counterclaims were founded on Schaefer's failure to meet, in 1976, the two conditions necessary to continue to possess and use the EDS system which Schaefer had voluntarily failed to perform.

On February 3, 1977, and confirmed in writing on February 7, 1977 by Christo, Nelipowitz and Christo modified the division of fee agreement to again provide for a division of fee based on the number of hours they worked but which also provided for Nelipowitz to receive 2-1/2% of the "recovery by Schaefer or . . . (whichever is the greater amount)". (A-14) Fifteen months later on May 26, 1978 Schaefer and Christo, without the knowledge of Nelipowitz, facially modified the "collectively referred to" Joint Retainer Agreement in a manner which confirmed a Schaefer/Christo modification of the September 7, 1976 as to the fee provisions therein and the apparent "subordinated" result but which [carefully] avoided any disclosure as to the manner in which or method by which the "subordinated fee" was actually computed. Under the terms of the Joint Retainer Agreement and by reason of the EDS-Schaefer Settlement on that day, the full fee pursuant to Par. 2 of the Settlement Agreement became due to "the attorney" as defined therein. In computing the "subordinated fee" Schaefer and Christo counted only the 2.3 million dollars in cash received by Schaefer less a 1.3 million dollar set-off. The record does not actually disclose the source of that set-off or whether it really related to the 1976 1.3 million dollar debt of Schaefer and the Second EDS Counterclaim, or to the Spring 1977 1.3 million dollar payment by Schaefer to EDS, paid during suit because EDS discovered said adverse information and thereafter and because of same, won a Judgment on its Replevin Counterclaim, and was thus going to preclude Schaefer from using EDS's system. We infer the latter from the Record (A-19, 20).

On May 26, 1978 Schaefer and EDS settled the main action and Schaefer and Christo and EDS, directly or indirectly, then subordinated and otherwise interfered with Nelipowitz's Statutory Lien and Equitable Assignment.

They so interfered by reducing the apparent settlement amount, first by failing to properly include certain EDS-Schaefer transactions, to wit EDS's release of Schaefer's 1976 debt, the subject of EDS's Second Counterclaim, and also Schaefer's acquisition, at the time of settlement, of a new property right to possess and use the EDS System which had cost 4 million dollars to develop which had been the subject of EDS' other Counterclaims. Secondly, they so interfered by improperly including a set-off against the net amount (as defined) that Schaefer recovered, of a separate Spring 1977 payment transaction. They also failed to pay Nelipowitz anything pursuant to his Equitable Assignment (the September 7, 1976 Joint Retainer Agreement) (A-12) and the related division of fee agreement of February 3, 1977 (A-33, par. 7 & 8) confirmed by Christo's February 7, 1977 letter (A-14).

Schaefer and Christo effectuated said subordinations and other interferences with Nelipowitz's Statutory Lien and Equitable Assignment on May 26, 1978 the day of the EDS/Schaefer Settlement Agreement and on which the Schaefer/ Christo "subordinated fee" agreement was effectuated by inducing a New York law firm which never sought a Substitution Order, as required, to execute with Christo (who was not qualified to execute stipulations and who had been admitted *pro hac vice* on Nelipowitz 's motion 2 and 1/2 months after Nelipowitz had appeared), Stipulations of Dismissal and Bond Release, all in breach of the Federal District Court's own Rules concerning appearances, substitutions, and execution of Stipulations.

Said Stipulations were accepted and signed by the attorneys for Defendants who knew Nelipowitz was the Attorney of Record. [Defendants EDS did not make any inquiry as to the compensation due Nelipowitz]. EDS claims it was never properly before either of the Federal Courts below but was nonetheless dismissed *with prejudice.*

PROCEDURE

EDS was named a Respondent in this proceeding below almost six months after the Petition to Determine and Enforce was filed. Particularly because of EDS's "position" in this case as a "Noticed" but non-appearing Defendant-Respondent that claims it was not properly before either Court below but was nonethless dismissed *with prejudice* we are summarizing the procedural events in the District Court; excluding all of the discovery and less important Motion matters left unresolved below. They are as follows.

Nelipowitz's secured right to compensation attached on September 7, 1976 when he appeared on the same day the equitable assignment was executed and in which the Schaefer "client[s] hereby agree to retain [and pay] . . . attorneys . . . (hereinafter referred to collectively as 'the attorney'). . . ." (A-12). Christo and Nelipowitz were then the only two attorneys comprising 'the attorney' and were both equitable asignees *pro tanto.* (See Point 5, *infra.*) Some 21 months later on May 26, 1978 at least two agreements were made (as produced by Mr. Christo). One was the Schaefer-EDS Settlement Agreement (A-17-19). The other was the subterfuge facial amendment (A-21) to the original Joint Retainer Agreement (A-12) confirming that Schaefer and Christo had subordinated that original fee agreement and Nelipowitz's statutory lien. (A-21) (See Point 9, *infra*). [And we question whether they actually were two separate "2 party" agreements or in reality one "3 party" agreement appearing in form as two separate two party agreements. We do not know yet, for example, and obviously will not find out unless Schaefer and Christo are compelled to disclose which document Schaefer executed first and thus which agreement was actually entered in to first. See Points 9 and 10.]

At the inception of this proceeding on September 1, 1978 Nelipowitz the in-state New York attorney for Schaefer, and the Attorney of Record for Schaefer was reluctant to bring either client Schaefer or Defendants EDS into such proceeding, at least without knowing more about the settlement that occurred without his knowledge on May 26, 1978 which he discovered June 14, 1978 (A-37, par. 14); especially so in light of the instructions of Mr. Vumbacco, Schaefer's then internal general counsel, shortly thereafter, to speak exclusively to Christo (A-38, par.14).

Also a preliminary review of N.Y. law indicated at least a possibility that Schaefer might be entitled to claim it was, or be, a nominal party. Nelipowitz noted that possibility himself in his initial memorandum so that the Court would not be unaware of the possibility. He also noted grounds upon which Schaefer should not be a nominal party.

Discussions with Christo took place without a satisfactory conclusion. Accordingly on September 1, 1978 he named only attorney Christo, a jointly retained attorney as a Respondent.

In November 1979 he moved to add Mr. Watson, Christo's new partner(A-86) who together with him had moved their office from Massachusetts to New Hampshire shortly after the Settlement (A-55, par.3).

On December 20, 1978 (A-9) Judge Motley ordered Christo, Watson and Schafer to Respond to the Petition by January 15, 1979 and scheduled a conference to be held on January 19, 1979 "to set a date for an evidentiary hearing" (A-9). *No evidentiary hearing was ever held.* The "scheduling conference" was postponed to January 26, 1979. Christo then, without any prior notice, presented Requests For Pre-Hearing Rulings (A-24) to which Nelipowitz was ordered to respond by February 2, 1979 (A-11) which he did (A-25-29). On and after January 19, [the orginal date for the "scheduling conference"] discovery controversies arose, which were never resolved, caused by Christo's unfounded claim that he was the attorney of record (A-81,3) and the previous Vumbacco affidavits (A-85,90) and Schaefer's January 2, 1979 Response To Petition (A-92,3) all in essence claiming that Schaefer had no agreement with Nelipowitz. Nelipowitz needed discovery to prepare for an evidentiary hearing in which Schaefer and Christo were obviously not going admit the circumstances under which Nelipowitz and Christo were retained and to determine the real reasons Christo subordinated (A-21) the attorney fee agreements (A-12) on the day of settlement when the fee had been fully earned.

On January 21, 1979 Judge Motley, while not ruling Schaefer was a nominal party, declined to permit any discovery against Schaefer and indicated her feelings that Schaefer should not be a party (R-309, pp. 22).

In the January 26 to February 17, 1979 period Nelipowitz researched the matter further and on

February 17 filed a Memorandum that first noted the potential *Beecher* and *Fischer-Hansen* aspects (R-276, pp. 42 and 50) of the proceedings. There were several scheduling changes as to the hearing to be held; the latest from March 3 to 10, and then from March 10 to 17, 1979. Because a hearing was scheduled for March 10 Nelipowitz, on February 27, formally Noticed a Second Request For Pre-Trial Rulings (A-30-31) to all the parties, including therein the First Request that had been ordered by the Court(A-25-29) so that EDS wouuld be on notice as to all Requested Rulings. (R-280). He then included EDS as a Respondent for the first time in a Motion to be heard at the then scheduled March 10, 1979 hearing. (See Point 10). It was again postponed to March 17, and then canceled, when Judge Motley suddenly issued the Opinion at issue here on March 16, 1979.

REASONS FOR GRANTING WRIT

POINT 1

This Court must exercise its supervisory power.

The consideration requiring that the Supreme Court grant certiorari pursuant to Rule 19 (and also act pursuant to Rule 30) is that this Court is the single most appropriate forum and probably the only forum (unless the New York courts were to in effect subsequently overrule the Federal Courts themselves as to deciding what New York law is either directly as a result of future litigation permitted by the Judgment below or otherwise) in which to correct the failure of the Federal Courts below to themselves comply with the Federal Conformity Law

(28 U.S.C.A. 1652) in numerous respects (See Points 3,4, 5, 8, 9, 10 and 12) and to therefor exercise this Court's power of supervision. As this Court recognized in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) a Federal Court's failure to comply with the Federal Conformity Law results in the loss of equal protection under the Constitution. Moreover the Federal Courts below in effect violated Petitioner's Constitutional right to due process by failing to take Petitioner's allegations (and/or Mr. Christo's admissions including the documents he produced (but not yet authenticated by Schaefer) as true. See especially Points 5, 6, 8, 9, 10, and ll *infra*.

A failure by this Court to enforce in this specific instance its own *Erie* requirement that the Federal Courts below comply with the Federal Conformity Law would be an endorsement of their unlawful acts and omissions and would also sanction their refusal to properly apply the existing Rules of the very Federal District Court in which the main action occurred, the violations of which squarely caused this case, and thereby place this Court itself in a position of condoning Federal Court Rule violations.

In addition, both of the Federal Courts below require supervision because they completely and utterly failed to take Petitioner's allegations as true in an equitable proceeding that under New York law is intended to provide quick summary relief for non-payment of an attorney fee. Petitioner's fee was due May 26, 1978.

If existing law and opportunity permits and if the decision below be upheld for any reason Petitioner here will ask other fora to compel attorney Christo to make clients Schaefer parties to *fully* enforce the statutory lien that his law firm purportedly now has, according to the Opinion, for the benefit of Petitioner here.

POINT 2

The Federal Courts below have violated Nelipowitz's Constitutional Rights.

No citations of law should be needed for the self-evident propositions that both a New York statutory attorney lien and an equitable assignment are property rights and that Nelipowitz is entitled to equal protection under the law and to due process. For the reasons that are otherwise set forth in this Petition Nelipowitz's constitutional rights were violated by the Federal Courts below who refused to take his allegations as true, (see Points 5, 6, 7, 8, 9, 10 and 11) and themselves breached the Federal Conformity Law (28 U.S.C.A. 1652)(see Points 4, 8, 9, and 10). United States Constitution, Amendment XIV; *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 Sup. Ct. 817 (1938); *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 65 Sup. Ct. 1464, 160 A.L.R. 1231 (1945) Rehear den. 326 U.S. 806, 66 Sup. Ct. 7; *Radovich v. National Football League*, 352 U.S. 445, 77 Sup.Ct. 390 (1957); *Gardner v. Toilet Goods Association*, 387 U.S. 167, 87 Sup. Ct. 1526 (1967), *Walker v. Hartford Realizaton Co. Inc.*, 74 F. 2d 56 (C.A.2 1934).

POINT 3

By dismissing Nelipowitz's Petition with prejudice as to client plaintiffs Schaefer, defendants EDS and Attorney Watson and failing to follow New York law the Federal Courts below failed to comply with the Federal Conformity Law (28 U.S.C.A. 1652) and violated Nelipowitz's rights of equal protection and due process under the Constitution.

"The laws of the several states...shall be regarded as rules of decision in civil actions in the courts of the

United States". 28 U.S.C.A. 1652. The purpose of conformity to state law where federal jurisdiction depends on diversity jurisdiction [and which underlies this ancillary Statutory Petition equitable proceeding case] is to prevent the accident of citizenship from changing the outcome, and such purpose extends as much to determining whether the court shall act at all as to how it shall decide. *Weiss v. Routh*, 149 F.2d 193 (C.A. 2 1945). And "[I]t is the source of the right sued upon, and not the ground on which federal jurisdition over the case is founded, which determines the governing law. * * * *Thus, the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law. Maternally Yours, Inc. v. Your Materity Shop Inc.*, 234 F.2d 538, 540-541 n.1 (C.A. 2 1956). And it is beyond doubt that the substantive law governing the statutory, property and equitable assignment rights at issue in the case at bar are the cases and statutes cited herein. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *In Re Washington Square*, 5 N.Y.2d 300 (1959) cert. den. 363 U.S. 841 (1960); *DeLaPaz v. Coastal Petroleum Transport Co. Inc.*, 136 F. Supp. 928 (D.C. S.D. N.Y. 1955); *In Re Mayfair Construction Co.*, 170 F. Supp. 657 (D.C. N.J. 1959).

This case arose from a main action founded solely on diversity jurisdiction as to Schaefer's *state* claims to enforce in-state New York Attorney of Record Nelipowitz's rights arising from the N.Y. charging lien statute (N.Y. Jud. L. §475) and from his equitable assignment lien including the related division of fee agreement (A-12; 14; 33; 35) when such compensation agreements are unrestrained by law (N.Y. Jud. L. §474) and his rights under the decisions by the highest state courts cited in this brief (including certain applicable New York Appellate Division decisions). Both the Statutory Lien and the Equitable Assignment attached to Schaefer's claims on September 7, 1976 at the commencement of the action. N.Y. Jud. L. §475; *Fischer-Hansen v. Bklyn Hts. R.R. Co.*, 173 N.Y. 492 (1903);

Beecher v. Vogt Manufacturing Co., 227 N.Y. 468 (1920). Said agreements are binding on Schaefer and Christo as a matter of law. *Manufacturers and Traders' Trust Co. v. Commercial Door and Hardware Inc.*, 51 A.D.2d 362, 381 N.Y.S.2d 709 (4th Dep't 1976); *James Talcott, Inc. v. Wilson Hosiery Co. Inc.*, 32 A.D.2d 524, 299 N.Y.S.2d 460 (1st Dep't 1969); *Knight v. Kitchin*, 237 App. Div. 506, 261 N.Y. Supp. 809 (4th Dep't 1933); *Amend v. Hurley*, 293 N.Y. 587, 59 N.E.2d 416 (1944); *Canney v. New England Telephone and Telegraph Co.*, 228 N.E.2d 723 (Mass. 1967); *Onanian v. Leggat*, 317 N.E.2d 823 (Mass. App. 1974); *Farrell v. Chandler, Gardner and Williams, Inc.*, 252 Mass. 341, 147 N.E. 822 (1925). Division of fee agreements are lawful in New York. *Harwood v. LaGrange*, 13 N.Y. 538 (1893) *Bohm v. Holzberg*, 69 Misc.2d 469, 329 N.Y.S.2d (1st Dep't 1972); *Oberman v. Reilly*, 66 A.D.2d 686, 411 N.Y.S.2d 23 (1st Dep't 1978); *Jontow v. Presant*, 34 A.D.2d 744, 310 N.Y.S.2d 145 (1st Dep't 1970); *Sterling v. Miller*, 2 A.D.2d 900, 157 N.Y.S.2d 145 (2d Dep't 1956) aff'd 3 N.Y.2d 778,164 N.Y.S.2d 32, 143 N.E.2d 789 (1957) and in Masachusetts *Kisloff v. Merchants National Bank of New Bedford*, 297 N.E.2d 513 (Mass. App. 1973).

Nelipowitz's Petition was dismissed *with prejudice* as against client Schaefer, Mr. Watson another equitable assignee pro tanto who may have "proceeds" which Nelipowitz may follow under the statute, and Defendants EDS, against whom he has an independent rights (see Point 10), inter alia, on the theory that the statutory lien of an in-state New York attorney ran to an out-of-state law firm based upon assumed facts contradicted on the Record by that one-man firm. The dismissal of Christo purportedly, and patently intended to be, without prejudice to litigating in other fora is actually prejudicial as that deprives Nelipowitz of his property rights on issues that Christo will presumably claim in said other fora are *res adjudicata* (See Point 11).

Nelipowitz sought to enforce his rights by a Statutory Petition under the second sentence of said §475 which equitable procedure is merely one of several available and cumulative remedies *Citizen's Bank of White Plains, New York v. Oglesby,* 270 App. Div. 136,, 58 N.Y.S.2d 591 (2d Dep't 1945) which remedy was "a new remedy" for attorneys *Fischer-Hansen, supra* at 498 and it is elementary that by exercising one of his cumulative rights an attorney does not waive his other rights. *Botein, Hays, Sklar Herzberg v. Polymetrics Intn'l Inc.,* 81 Misc.2d 398 (Civ. Ct. City of N.Y. N.Y. Co. 1975).

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. *Erie Railroad Co. v. Tompkins,* 114 A.L.R. at 1492-3.

Here the Opinion mutilated the explicit command of the Congress to apply State law and a Federal Court may not substanially affect the enforcement of a right given by the State. *Guaranty Trust Co. of New York v. York,* 326 U.S. 99, 160 A.L.R. 1231 (1945). And this Court has authoritatively declared:

> The source of substantive rights enforced by a Federal Court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court such law ought to govern in litigation founded on that law, whether the forum of application is a State or Federal Court and whether the remedies be sought at law or may be had in equity. *Id* at 1239.

And when the highest court of a state has spoken, its pronouncement is to be accepted by the Federal Courts as defining state law unless the State's highest Court later gives clear and persuasive indication that its pronouncement will be modified, limited or restricted. *West v. American Teleph. & Telegraph Co.*, 31 U.S. 223 (1940); *Monaco v. Chrysler Sales Corporation*, 191 F. Supp. 648 (D.C. S.D. N.Y. 1961). In short, a New York Appellate Division case such as *Roskind v. Brown*, 29 A.D.2d 549, 285 N.Y.S.2d 410 (2d Dep't 1967), even if it were contrary to a N.Y. Court of Appeals case (which it is not, See Point 7 and all of Point 8*infra*) cannot be a controlling case. In any event *Weinstein v. Seidmann*, 173 App. Div. 219, 159 N.Y. Supp. 371 (1st Dep't 1916) (the New York landmark case holding that only the Attorney of Record holds the lien), *Citizen's Bank, supra* and *Kelly, infra* and *Harwood, Archibald, Delval, Sargent, Fischer-Hansen, Robinson, In Re Niagra L. & O. Power Co.* and *Beecher, supra* are all controlling cases that Federal Courts are obliged to follow.

Disregarding here the facts that Nelipowitz never had an opportunity to exercise his New York common law retaining lien and common law charging lien rights because the client's other attorneys breached the Federal District Court's Rules, Nelipowitz, the Attorney of Record who appeared (A-111) has his statutory charging lien rights and, he is one of the several jointly retained attorneys and in any event has an equitable assignment and must show only that the agreement was made *with authority* and need *not* show *direct retention. Harwood v. LaGrange*, 137 N.Y. 538, 540 (1893); *LaFetra v. Hudson Trust Co.*, 203 App. Div. 729 (1st Dep't (1922) aff'd 236 N.Y. 533 (1923); *Barnes v. Alexander*, 232 U.S. 117 (1914); *Delval v. Gagnon*, 213 Mass. 203 (1912) ; *Woodbury v. Andrew Jergens Co.*, 69 F.2d 49 (C.A. 2 1934); *Walker v. Hartford Realization Co.*, 74 F.2d 56 (C.A. 2 1934); *Archibald v. Panagoulopoulos*, 233 N.Y. 478 (1922). And because he appeared with authority to appear, which has never been questioned, and is the Attorney of Record (A-4;, R-309, p. 25; Ct. App. Judg. 11/2/79) he holds the statutory charging lien (N.Y. Jud. L. §475; *Kelly v. New*

York City Ry. Co., 122 App. Div. 467, 106 N.Y. Supp. 894 (2d Dep't 1907).

In addition to the point that *Roskind* cannot be interpreted contrary to *Harwood's* express ruling that an attorney need not be directly retained, *Roskind* cannot be so interpreted without also implicitly holding that the New York Second Department somehow overruled itself by *sub-silentio* changing the *Kelly* rule that what a New York attorney must show is his *authority* to appear. *Kelly*, is clearly a controlling case. See *West, supra* and *Eversharp, Inc. v. Pal Blade Co. Inc.*, 182 F.2d 779 (C.A. 2 1950). And *Kelly* was expressly briefed in *Roskind*(Supp. Append., Altman Brief p. 9). *Roskind carefuly avoided overruling or modifying Kelly* or *Mitchell, infra* at Point 8B., in any way. Thus this case is completely unlike the situation in *Wickes Boiler Co. v. Godfrey-Keeler Co.*, 121 F.2d 415 (C.A. 2 1941). And the *Roskind* court as an appellate court lacked the power to reach the possible question of Mr. Blumberg's *authority to appear* due to the unresolved factual dispute as to Mr. Glazer's discharge date. See Point 8C.

Moreover, in addition to all the other reasons set forth as to why *Roskind* and *Harwood* are not inconsistent with one another (See Point 8C.), in the case at bar there is a subsidiary dipute among the equitable assignee pro tanto attorneys (Christo, Watson and Nelipowitz) who represented the same client (Schaefer). No such conflict was evident in *Roskind* (or for that matter in *Woodbury, Application of Peters* or *Reilly*) but *Harwood* involved exactly such a conflict. Thus even if the *Roskind* decision had been by or affirmed by the N.Y. Court of Appeals, *Harwood* would, on the facts, still be the controlling case.

While *Roskind* held Mr. Glazer did not hold a statutory charging lien we completely agree with *Roskind* because Mr. Glazer never appeared which is what the §475 requires. But the District Court's claim resting solely on *Roskind*, that an "of counsel" attorney may not enforce his compensation rights is substantively contrary to *Harwood*, *Application of Peters*, *Reilly*, *Woodbury*, and to *Roskind* itself. Observe also that none of those multiple attorney "of counsel" cases actually involved the additional issues present in this case governed by *In Re Niagra L. & O. Power Co., infra* Point 4, *Beecher, infra* Point 9, and *Fischer-Hansen, Robinson, and Sargent infra* Point 10.

For the foregoing reasons and the reasons set forth in succeeding Points 4, 5, 6, 8, 9, 10, 11, and 12 of this Brief the Federal Courts below failed to comply with the Federal Conformity Law (28 U.S.C.A. 1652) and thereby, and otherwise violated Petitioner's Constitutional rights to equal protection and due process. U.S. Constitution, Amendment XIV; *Erie Railroad Co. v. Tompkins, supra*. We shall not belabor the Constitutional issues at this time since, as it did in *Erie, supra* at p.23 we believe this Court will resolve the Constitutional issues present by compelling the Federal Courts below to comply with the Federal Conformity Law and thereby, also indirectly, the need to otherwise protect Petitioner's Constitutional rights to equal protection and due process on controverted facts.

POINT 4

By Dismissing Schaefer, EDS and Watson *with prejudice* the Opinion below committed totally irreconcilable error and breached the Federal Conformity Law thereby failing to give Nelipowitz equal protection and due process under the Constitution.

We respectfully invite the attention of this Court to the inconsistent statutory interpretation *within* the Opinion (A-6). The District Court ruled that Nelipowitz, *of New York* who *appeared* (A-4; A-111) was Attorney of Record (*Id*; R-309,P.25). It then erroneously ruled that the

New York statutory lien, the lien prescribed by the first sentence of N.Y. Jud. L. §475, ran to the out-of-state Christo firm. One fatal inconsistency of the Opinion is that it then further ruled, implicitly as a matter of jurisdiction by dismissing Nelipowitz's Statutory Petition as to Schaefer, EDS and Mr. Watson *with prejudice* and without any proper qualification, that Nelipowitz, who appeared on September 7, 1976, was entitled to file a Petition under the second sentence of the same §475. We shall assume *arguendo* that the District Court might properly have merely refused to entertain this equitable proceeding or to have expressly declared it was applying the *abstention* doctrine, uniformly and *without prejudice* as to all Respondents which, except for loss of forum of choice, might well have rendered an appeal to the Second Circuit and to this Court unnecessary. If the District Court had done so, petitioner's problem would simply have been a question of which forum and which other remedial procedure to use concering the problem of one equitable assignee pro tanto litigating against the Assignor client, possibly in the absence of the other equitable assignees pro tanto who lacked the capacity to hold the statutory lien under New York law both generally, and squarely so under the recent *Rosenberg* case (See Point 6 *infra*), when Petitioner's basic claim is that both the client and the other equitable assignees pro tanto, interfered with and improperly subordinated and failed to properly pay Petitioner in accordance with Petitioner's pro tanto equitable assignment which was secured by Petitioner's statutory charging lien under New York law.

Said fatal inconsistency of the Opinion was to in effect apparently take jurisdiction of a New York Attorney of Record's *Statutory* Petition under the *second* sentence of §475 and to then dismiss five of the six Respondents including EDS who never even appeared in this ancillary case *with prejudice* when, if the District Court's conclusion that the lien ran to the out-of-state Christo firm was correct, Nelipowitz could not logically have been an attorney entitled to file the *statutory* Petition. See *Weinstein, supra.*

The Opinion ruled, without any hearing, that Nelipowitz, the Attorney of Record who purportedly does not have a lien under the first sentence could nonetheless be dismissed *with prejudice* for filing a Statutory Petition pursuant to the second sentence of the very same statute when both rights (lien possession and the statutory right to Petition) rest upon the *appearance* required by the first sentence and when Nelipowitz was merely exercising, in the first instance, a statutory right providing "a new [i.e. additional] remedy" to attorneys *Fischer-Hansen v Brooklyn Hts. R.R. Co.*, 173 N.Y. 492, 498 (1903)*.

One source of error was the Opinion's failure to recognize retention, appearance and fee payment *authority* distinctions under New York law and which must also be followed by Federal Courts "as declared by statute or the States highest Court" (28 U.S.C.A. 1652; *Erie, supra* (§475, §474, *Harwood, Sargent and other N. Y Court of Appeals cases) and to recognize that New York*

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*That *Statutory* remedy is merely one of a New York attorney's arsenal of available remedies, *Citizen's Bank of White Plains New York v. Oglesby*, 270 App. Div. 136, 58 N.Y.S.2d 591, 594 (2d Dep't 1945). And the lien arises from the statute. *Robinson v. Rogers*, 237 N.Y. 467, 472,143 N.E. 647 (1924); *Sargent v. McLeod*, 209 N.Y. 360, 365, 103 N.E. 164 (1913). The proceeding is not one that goes to the establishment of the *statutory* lien which comes into existence upon appearance at the commencement of the action. N.Y. Jud. L. §475; *Fischer-Hansen, supra; Application of Peters*, 271 App. Div. 518, 67 N.Y.S.2d 305 (3d Dep't 1946) aff'd 296 N.Y. 974, 73 N.E.2d 560 (1947); *Sargent, supra*, but is merely one to determine the value of and foreclose the lien. *Application of Peters, Id, Sargent, supra* at 362; *Fischer-Hansen, supra* at 497; *Robinson, supra* 472. And it is elementary that by exercising one of his cumulative rights an attorney does not waive his other rights. *Botein, Hays, Sklar, & Herzberg v. Polymetrics International Inc.*, 81 Misc.2d 398, 366 N.Y.S.2d 251, 256 (Civ. Ct. City of N.Y. N.Y. Co. 1975) The present second sentence in §475 is the third *new* sentence referred to in *Fischer-Hansen.* The former first sentence covering compensation agreements is now a part of §474] *law provides, as to retention, that a retainer agreement need not be made directly with the client so long as it is made with proper authority. Harwood v. LaGrange,* 137 N.Y. 538, 540; 32 N.E. 1000 (1893), and that the statute (§475) requires an appearance; with authority. See Point 8.

Another primary cause of the error was the failure of the Federal Courts below to also recognize that not only under New York law, which the Federal Courts below were required to follow but as a matter of simple legal logic it is irreconcilably inconsistent for a client to deny that the attorney was retained and simultaneously, without litigating that issue, obtain the benefit of a *with prejudice* dismissal. See *In Re Niagra, L.& O. Power Co.*, 203 N.Y. 493, 97 N.E. 33 (1911) which is the mirror image of this case and holds that a client cannot simultaneously maintain a summary proceeding*, to recover papers and deny the existence of the attorney client relationship which is the foundation of the proceeding. Here the client and attorney positions are reversed but the Opinion nonetheless fell into irreconcilable error, regardless of whether Nelipowitz was retained, jointly retained or sub-retained or retained directly or indirectly, by dismissing Nelipowitz's Petition, as to Schaefer, EDS and Mr. Watson, *with prejudice.*

The two foundations of Nelipowitz's rights were (i) his *appearance* made with Schaefer's authority [N.Y. Jud. L. §475; *Kelly v. New York City Ry. Co.*, 122 App. Div. 467, 106 N.Y. Supp. 894 (2d Dep't 1907)] which Schaefer never questioned (A-85, 88-94) (which controls both his *statutory* lien and his *statutory* remedy) and (ii) his Equitable Assignment(A-12) (See Point 5) *Harwood v. LaGrange, supra.* Schaefer claimed only *non* retention. And one source of authority (in addition to the other sources of Nelipowitz's authority to appear(See A-34, par.6; A-46ff, par. 4,-16; A-74) for retention, appearance and payment obligation was the September 7, 1976 Joint Retainer Agreement (A-12) executed on the same day as his appearance.

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*The statutory proceeding is intended to be an equitable, and quick, means of determining and enforcing the lien.]

We further submit that Schaefer never even properly raised a *non*-retention issue. See the first Vumbacco Affidavit, September 22, 1978 in support of Christo (A-85); the second Vumbacco Affidavit of October 30,, 1978 submitted by Rogers & Wells(A-88-89) after Nelipowitz served Schaefer [but still did not then name Schaefer as a Respondent and merely moved that Schaefer appear by new counsel (A-115;R-247).] It was after the District Court, on December 20, 1978, ordered Schaefer to respond, that Schaefer filed it's January 2, 1979 Response To Petition claiming: (i) "Schaefer never retained Mr. Nelipowitz", (ii)"Schaefer is, at most, a 'nominal party', and (iii) "disclaims any involvement or interest" (A-92-93).

We also submit that that a claim of *non*-retention coupled with such a complete disclaimer of interest is substantively internally inconsistent within itself because it affirmatively places a substantive factual claim of *non-retention* in issue contrary to the express terms of the Joint Retainer Agreement (A-12) and Nelipowitz's opening allegation that " I am the attorney of record for plaintiffs" (A-32, par. 1) and "filed" [appeared] upon receiving Schaefer's instructions (A-34-5, par 6) but then disclaims any interest in the merits of the controversy, and that such a pleading cannot be the basis of dismissal *with prejudice* of five Respondents without violating Petitioner's right, under *In Re Niagra* and the Federal Conformity Law, to equal protection and to due process and which is what the District Court actually did in this case.

The Opinion in effect declared Nelipowitz was not "directly retained" (couched in legally erroneous terms that Petitioner must show same). It did not and could not hold Nelipowitz was *not* retained in the face of the Joint Retainer Agreement (A-12) that Christo himself put in the Record that provides client[s] hereby agree to retain "attorneys", etc. The District Court fell into a trap sprung by Christo and Schaefer. It disregarded both that the retainer clause of the Joint Retainer Agreement expressly referred to "*attorneys* ... collectively referred to" (A-12) [Compare the incomplete quotation in the Opinion (A-3)] and that Paragraph 2. of that agreement says that Schaefer will pay "the attorney" so defined.*Id* The Court said "I don't think Schaefer is properly in this ..."(R-309, p. 22) and later erroneously accepted both Christo's "I am solely responsible — let Nelipowitz fight me elsewhere" argument founded in the *Roskind* partial dicta (See Point 8C. at p. 66 *infra*) and Schaefer's *non*-retention claim but declared Nelipowitz must show he was directly retained contrary to *Harwood v. LaGrange, supra* even though Schaefer never claimed Nelipowitz was *not directly retained* (A-85, 88-94) and claimed only that Schaefer "*never retained Mr. Nelipowitz*"(A-92). It did so notwithstanding that "authorized" sub-retention is clearly lawful (See *Harwood*) and that compensation agreements of attorneys or counsellors are not restrained by law. N.Y. Jud. L. §474 and cases cited Point 8B. and 8D. Division of fee agreements are expressly permitted. §491.

Moreover, the retention clause produced by Christo but not authenticated by Schaefer (A-12) in any event also contained sub-retention authority (A-12) and regardless of whether joint retention or sub-retention was involved, Paragraph 2. of the agreement still provided that Schaefer would pay the attorneys *collectively* referred to as 'the attorney' (A-12). The lien secures the compensation *Robinson* and *Sargent, supra*. By failing to face any retention issue squarely (or any authority issue—See all of Point 8.) and on an erroneous declaration that Nelipowitz must show (without giving him any opportunity to show) he was *directly* retained (A-4,5,6) and notwithstanding that in either case Schaefer had still expressly agreed to pay the collectively referred to '. . . attorney' (A-12) when compensation agreements may be express or implied (N.Y. Jud. L. Section 474) the District Court failed to address the real issue, that under New York law only an *appearance*, with authority, is required to hold the statutory lien. See *Kelly, supra*, also discussed in Point 8B. at p. 57. But by also simultaneously declaring "the attorney's lien would run to Christo's out-of-state law firm" (A-6) when Christo, either individually or as a firm never could have even participated in the case absent Nelipowitz's *pro hac vice* Motion 2 1/2 months after Nelipowitz appeared (R-19) owned and held the statutory lien and by also dismissing Nelipowitz's Statutory Petition *with prejudice* as to Schaefer, Watson and EDS, all the opinions and the judgments below committed totally irreconcilable errors; under two different sentences of N. J. Jud. L. Section 475, under Section 474, and under *Harwood*; *Sargent*; *Robinson*; *In Re Niagra, L. & O. Power Co.*; *Fischer-Hansen*; *Citizen's Bank*; *Botein, Application of Peters*; *Kelly*; and *Rosenberg v. Johns-Manville Sales Corp.*, 416 N.Y.S.2d 708 (1979). And it committed further error under *Beecher* and *Fischer-Hansen*. See Points 9 and 10. See also Points 6 to 8 and 11 to 13.

And by failing to apply *In Re Niagra, L. & O. Power Co.* to this mirror image case we submit that the Federal Courts below breached the Federal Conformity Law (28 U.S.C.A. 1652) and failed to grant Nelipowitz equal protection (*Erie, supra*) and due process.

POINT 5

Nelipowitz is an equitable assignee *pro tanto.* The Opinion is inconsistent with the Second Circuit's own prior opinions in *Walker* and *Woodbury* and this Court's Opinion in *Barnes* and the New York cases of *Harwood, Archibald and LaFetra* and the *Delval* case in Massachsetts.

Under the law of this Court, the Second Circuit, New York and Massachusetts Nelipowitz has an equitable assignment *pro tanto,* frequently called an equitable assignment lien, and this would be so even if Nelipowitz were not the Attorney of Record holding the statutory charging lien pursuant to N. Y. Jud. L. §475. See *Barnes v. Alexander,* 232 U.S.117 (1914); *Harwood v. LaGrange,* 137 N.Y. 538 (1893); *Archibald v. Panagoulopoulos,* 233 N.Y. 478 (1922); *LaFetra v. Hudson Trust Co.,* 203 App. Div. 729 (1st Dep't 1922) aff'd 236 N.Y. 533 (1923); *Delval v. Gagnon,* 213 Mass. 203 (1912); *Walker v. Hartford Realization Co. Inc.,* 74 F.2d 56 (C.A. 2 1934) and *Woodbury v. Andrew Jergens Co.,* 69 F.2d 49 (C.A. 2 1934).

It is plain and simple controlling law that an agreement as here (A-12, 14, 33, 35) to pay out of an identifiable fund gives rise to an equitable assignment lien; in this case pro tanto. And the same rule clearly applies when a division of fee agreement or even subretention is the basis for same. See *Harwood, Archibald, Barnes* and *Woodbury, supra.*

Entirely apart from the numerous and plainly incredible violations of the Federal Conformity Law (See Point 3) by the Court of Appeals below on an issue that was squarely raised, we submit that this Court simply cannot allow a U.S. Court of Appeals to permit a District Court to overturn 87 years of decisional law of this Court, New York, Massachusetts and of the Second Circuit itself on the Record at bar which includes, among other things, independent evidence of many of the facts leading up to and surrounding retention, appearance, authority etc. (A-46, Par. 4-19) and the Joint Retainer Agreement submitted by Respondent Christo himself and whose authenticity remains unchallenged by Respondent Schaefer; that provides:

> client [Schaefer] further agrees to pay the 'attorney' ... [who is defined in the agreement as "Christo ... and such other attorneys as he may choose to associate with him, (hereinafter collectively referred to as 'the attorney') in the event of affirmative recovery, settlement or execution ... (33 1/3% of the net amount received by the client ... (A-12)

Even Christo acknowledged that "The fee provisions provide for payment to 'the attorney' defined in the agreement to include Christo and whatever other attorney he chooses" (Christo Ct. App. Br. at 16). Compare the substantially similar agreement at issue in *Woodbury, supra* at 50, the much less specific agreement in *Walker, supra* at 57 and the actual or alleged division of fee and main agreements in *Harwood, Archibald* and *Barnes, supra.* Affirming the Opinion was flagrantly inconsistent with the Second Circuit's own prior correct pronouncement that Mr. Walker had properly alleged an equitable lien cause of action (*Walker, supra*) and its earlier pronouncements in *Woodbury, supra* at 50:

> Arthur Berenson, not being an attorney of record, had no [statutory] charging lien [but] nevertheless ... became by the law of New York an equitable assignee of the cause of action pro tanto.

* * * *

> The same doctrine obtains in federal court.
>
> * * * *
>
> As to Arthur Berenson's claim, it can scarcely be that an equitable assignee is in a weaker position than a statutory lienor, who is often referred to as such an assignee.(It should be noted here that the Second Circuit did not refer to *Beecher, infra* Point 9, which was then controlling law in New York and with which the Second Circuit then substantively agreed voluntarily; four years before it would have been compelled to apply it, as it is now compelled to apply such New York law under *Erie Railroad Co. supra).*

The Second Circuit had thus previously twice cited *Harwood, supra* with approval as to two equitable assignees and also expressly said to this "may be added Archibald" (*Walker, supra* at 57), a N.Y. Court of Appeals case involving a division of fee agreement among businessmen, and where none of those parties were statutory lienors, but incredibly dismissed Nelipowitz's claim against Schaefer *with prejudice* when Nelipowitz is both an equitable assignee *pro tanto* and, under N.Y. Jud. L. §475, the Attorney of Record statutory lienor.

The Court of Appeals did not write an opinion. The District Court opinion fails to refer to the "collective attorney" clause which controls both Schaefer's payment obligation and Schaefer's actual retention of the "collectively referred to" attorneys and which is also a part of the equitable lien payment clause at issue (A-12) only partially quoted above. While the lack of uniformity in and the inconsistency of the Second Circuit's overturning of 87 years of decisional law may thus be obscured from public view and accountability, it nonetheless exists.

For the foregoing reasons, Nelipowitz is an Equitable Assignee *pro tanto* and the Second Circuit's decision here is contrary to its own prior decisions, although hidden by failing to disclose the apparently true terms of Schaefer's obligation to pay the collectively referred to "attorneys", in *Walker* and *Woodbury, supra*, and this Court's opinion in *Barnes*, and contrary to the law as declared by the highest Court of New York (See *Harwood, Archibald*, and *LaFetra*, supra) and of Massachusetts (*Delval, supra*) and to N.Y. Jud. L. §491.

For the foregoing reasons Nelipowitz, apart from his statutory lien rights is an equitable assignee pro tanto as to Schaefer's "proceeds".

POINT 6

On the facts at bar the Opinion's claim that the lien runs to the Christo firm and not to an associate *of* that firm is in error, is not supported by *Entertainment and Amusements*, the only cited authority, and is contrary to New York law and public policy and to the Federal District Court's own rules.

The Opinion states "the attorney's lien would run to Christo's law firm retained by the client and not to the associate *of* that firm." citing *Entertainment and Amusements of Ohio, Inc. v. Barnes*, 49 Misc.2d 316, 267 N.Y.S.2d 359, 362 (Sup. Ct. Onon. Co. 1966). Said case is correctly decided, but it is cited for an "associate *of*" proposition, *in dicta*, that is neither controverted nor relevant here. *Entertainment* did not deal with the *relevant* New York public policy concerning collaboration among in-state and out-of-state attorneys as to holding statutory liens. See discussion of *Rosenberg, infra*. In this case Nelipowitz, the in-state attorney was not an associate *of* Christo. Nelipowitz was independent of and "of counsel *to*" the out-of-state attorney, Christo.

The Opinion implicity assumes two erroneous facts. First, that Nelipowitz was not retained which is squarely contrary to the express words of the Joint Retainer Agreement [unauthenticated, but produced by Christo and so unchallenged by Schaefer] retaining 'the attorney', the identity of 'the attorney' being the group of attorneys "collectively referred to" [t]herein (A12). The Opinion's claim that Nelipowitz was an associate *of* the Christo Law Firm is totally and irrefutably false.

For four (4) federal judges to be unable to distinguish between a paid associate of a law firm (such as Mr. Watson, perhaps) and a wholly independent and "of counsel" *to* attorney to a law firm who is associated *with* that firm and is to be paid pursuant to a wholly contingent joint retainer and division of fee agreement, such as Nelipowitz here, should be distressing to this Court. If the error is not now corrected, then this Court would in effect approve the adoption of a *federal* policy, accidentally or deliberately, and in any event contrary to *state* law, *sub silentio*, preventing one of multiple attorneys of a client, from proceeding against the client's proceeds which, even absent the statutory petition remedy, he has a clear right to do under the New York Court of Appeals case of *Harwood, supra*, standing alone. And he has that right even without the benefit of possessing a statutory lien (*Id*). Similarly, the federal courts are in effect barring one of multiple attorneys of a client from questioning the value of the client's settlement and apparently improper fee subordinations (See Point 9 *infra*).

Christo himself truthfuly asserted "Nelipowitz was never an employee, or partner ... or a part of or an associate of the Christo Law Firm" (A-83, par 2.; A-105, par. 38). Nelipowitz was "of counsel" *to* Christo (A-33, par.3; A-105, par. 38; A-14)9. Compare Disciplinary Rule DR-2-102 (A)(4) and DR-2-107(A) and N.Y. Jud. L. §491.

For purposes of discussing this Point 6 we shall not belabor the "retention" issue covered elsewhere and shall concede *arguendo* that retention is a mixed legal-factual concept subject to. noting however New York law expressly declares indirect retention to be unimportant provided authority is present. *Harwood v. La Grange*, 137 N.Y. 538, 540, 32 N.E. 1000 (1893) and even that kind of authority is clearly present here (A-12). The agreement actually provides "client[s] hereby agree to retain ... attorney*s* ... (hereinafter referred to *collectively* as 'the attorney)...." (emphasis supplied).

Moreover there can be no dispute that an "Of Counsel" designation can only be made if there is "a continuing relationship *other than* as a partner or associate. DR 2-102 (A)(4). And, the Opinion notwithstanding, both Nelipowitz and Christo agree that Nelipowitz and Christo were not partners and that Nelipowitz was not an associate of the Christo firm. The Opinion in effect applied a rule to two erroneously assumed facts at least one of which never did take place and which Christo himself contradicts.

In *Entertainment & Amusements*, Attorney Barnes was a *member* of Melvin and Melvin "in all instances ... acting as a *member of* his firm". Barnes was not "of counsel". He asserted a common law retaining lien which rests on the possession of client property acquired by reason of the attorney-client relationship and which has nothing whatsoever to do with the N.Y. statutory charging lien acquired by appearing. N.Y. Jud. L. Sec. 475. And Mr. Barnes' error was in asserting a retaining lien on escrow property not acquired by reason of the attorney client relationship.

Mr. Barnes was the defendant, defended by his law firm in an action brought against him by plaintiffs who had previously discharged his law firm on a claim that an escrow agreement had been fully performed. Mr. Barnes claimed first that the Melvin and Melvin firm had a N.Y. common law retaining lien, or that he should have leave to re-plead if the Plaintiffs were entitled to the escrow property, and that the property should nonetheless be delivered to the Melvin and Melvin firm. He also claimed a common law retaining lien on the escrow property for the costs and expenses of escrow including charges for legal services to himself, as escrow agent, by the law firm representing him in the action. The actual holding of *Entertainment and Amusements* was that neither Mr. Barnes nor Melvin and Melvin had or could have a retaining lien on escrow property that had never been acquired in connection with work as an attorney.

Unlike Attorney Barnes, Nelipowitz filed the Complaint in the main action at Christo's and Schaefer's instructions (A-34-5, par. 6; A-99, par.19; A-46, Par.4-16, A-74), so appeared (A-111) when Christo could not appear (A-99, par.19; A-32) and thus acquired his statutory charging lien by his appearance (N.Y. Jud. L. Sec. 475). Nelipowitz also has an equitable assignment (See Point 5) and was jointly retained (A-12) and this is so even if he were only subretained. *Harwood , supra, Delval v. Gagnon*, 213 Mass 203, 99 N.E. 1095 (1912). And only the Attorney of Record may petition to enforce a statutory charging lien. See N.Y. Jud. L. Sec. 475; *Friedland v. 601 W. 149th St. Inc.*, 15 A.D.2d 742, 223 N.Y.S.2d 885 (1st Dep't 1962) and *In Re Ackerson,* 50 N.Y.S.2d Ackerson 359 (Sup. Ct. Queens Co. 1944); *Weinstein, infra.*

More importantly *Rosenberg v. Johns Manville Sales Corp.*, 416 N.Y. S.2d 708 (Sup. Ct. N.Y. Co. 708 (1979) was decided after the Opinion below. *Rosenberg squarely holds that an out-of-state law firm, such as Christo here, (A95, par.1; cf. A-99, par.19) may not appear in a New York court.Id* at 710. *Rosenberg further expressly said that as a matter of New York public policy even the hiring of an associate admitted to practice in New York is insufficient. Id.* It also declared that "there is no way that an out-of-state law firm, without a partner admitted to practice within [New York], may maintain an office for the practice of law in its firm name." *Id* at 711. In short, the Christo law firm was legally incapable of either practicing law in or of maintaining an office in

New York. N.Y. Jud. L. Sec.478; *Spivak v. Sachs*, 16 N.Y.2d 163, 263 N.Y.S. d 953, 211 N.E.2d 329 (1965) rev'g 21 A.D.2d 348, 250 N.Y.S.2d 666 (1st Dep't 1964); *Rosenberg; Spanos v. Skouras Theatres Corporation*, 364 F.2d 161 (C.A.2 1965 on reconsideration in banc 1966) cert. den. 385 U.S. 987 (1966). See also Point 13 and §491.

Neither Christo personally nor the one man Christo law firm, so called, could appear in either a New York court *Rosenberg, supra* or in the Southern District of New York. S.D. Rule 3(c), second sentence. And because Nelipowitz who was neither a partner, nor an associate nor any part of the Christo firm (as above) he could not hold the lien for the Christo law firm as a matter of New York public policy. The Opinion below relied on *Entertainment and Amusements* for a principle that was never even discussed in *Entertainment and Amusements* and which is not controverted here. And this is especially important in light of *Rosenberg* which squarely holds to the contrary *as a matter of New York public policy*. (They were decided by Courts of equal level in N.Y. and so far as our research reveals *Rosenberg* is the only New York case directly on point to the issue at bar.) And because the Christo Law Firm could not appear under either New York or Federal rules, it could not hold the N.Y. Statutory lien (N.Y. Jud. L. §475) or "enter appearances ..., sign stipulations or receive payments upon judgments, decrees or orders for Schaefer in the Southern District. S.D. Rule 3(c). And we further note in passing that while Christo and Nelipowitz, on the present Record did not agree who "the New York office" belonged to, there is no doubt that Christo and Nelipowitz who are jointly retained attorneys (A-12) and who are both equitable assignees pro tanto (See Point 5 *supra*) establishd that office in New York for the purpose of complying with S.D. Rule 4(a) (A74, par. 8; A-99, par. 19; Christo Court of Appeal Brief pp.3-4). And only Nelipowitz, the New York attorney could maintain such office (N.Y. Jud. L. Sec. 470; Sec. 484; *Rosenberg, supra*).

In this case it is Nelipowitz who was "of counsel" *to* Christo (A-3, par.3; A-105, par.38; A-14) and associated *with* Christo under the Joint Retainer Agreement (A-12) and the Attorney of Record (A-4; R-309, pp.25-6) who appeared (A-111) and held the statutory lien from the commencement of the action (N. Y. Jud. L. §475; *Fischer-Hansen v. Brooklyn Hts. R.R. Co.*, 173 N.Y. 492, 66 N.E. 395 (1903). And in New York only the Attorney of Record holds the *statutory* lien. *Weinstein v. Seidmann*, 173 App. Div. 219, 159 N.Y. Supp. 371 (1st Dep't 1916).

And Nelipowitz could only have been displaced by a proper Substitution Order of the Southern District and then only on a showing by affidavit of satisfactoy reasons therefor (S.D. Rule 4(c)) which Rogers and Wells never obtained (A-43, par.25). At the January 26, 1979 argument (which had actually only been called for the purpose of scheduling hearings) the failure of Rogers and Wells to obtain a Substitution Order was discussed (R-309, p.14). Mr. Carley of Rogers and Wells was present and participated for Schaefer throughout that "no subsitution discussion" and remained silent.(R-309) And the Stipulations of Bond Release in, and Dismissal of, the main action for Schaefer were, accordingly, never executed by attorneys qualified to so. Christo could not appear or execute Stipulations (S.D. Rule 3(c) and while Rogers and Wells might well be "attorneys or proctors" within the meaning of S.D. Rule 3(c) [which is not a matter of Record here but which Nelipowitz concedes on the basis of the firm's well known reputation] they never obtained a Substitution Order as expressly required by S.D. Rule 4(c).

For all of the foregoing reaons the Opinion's claim that the lien would run to the Christo Law Firm is in error and is not supported by *Entertainment and Amusements* and is contrary not only to New York law and public policy but to the Federal Court Rules as well.

Thus the Opinion's claim that the N.Y. statutory lien runs to the out-of-state Christo firm is in error.

POINT 7

The Opinion's claim that an "Of Counsel" allegation is insufficient is substantively contrary to *Roskind* on which it relies, and to the actual allegations and admitted facts on the record, and wholly unsupportable in New York law or on the facts of this case.

The Opinion states the same essential objection in three different ways. It objects to the absence of a "direct retention" allegation, the absence of a "co-counsel" allegation and claims that an "of counsel" allegation is insufficient. The Record shows that Nelipowitz claimed "I am the Attorney of Record for Plaintiffs, and that the word "direct" was never in issue until the Opinion issued on March 16, 1979 (when Petitioner, after receiving no answer to pending discovery matters (see Statement of Case, Procedure) and after having carefully reviewed the documents that Christo had produced was preparing a Motion for Judgment As To Lien Value, (R-294) citing joint retention discussed *infra*. And the Record contains the Joint Retainer Agreement (A-12) produced by Christo (R-259).

Before discussing the Opinion's claim that an "of counsel" allegation is insufficient to enforce a statutory charging lien to which such allegation has no relevance in New York (the proper questions are did the attorney appear and if he did was he authorized to do so) two points should be clarified.

First we acknowledge that an "of counsel" attorney *who has not appeared* may not personally enforce a statutory lien under and pursuant to N.Y. Jud. L. §475. This is so because of the statute itself which requires an appearance to have and enforce the statutory lien. N.Y. Jud. L. §475; *In Re Ackerson,* 50 N.Y.S.2d 359 (Sup. Ct. Queens Co. 1944); *Friedland v. 601 West 149th St. Inc.,* 15

A.D.2d 742, 223 N.Y.S.2d 885 (1st Dep't 1962). However an "of counsel" attorney clearly has other remedies against the client. *Harwood v. LaGrange*, 137 N.Y. 538, 32 N.E. 1000 (1893); *Citizen's Bank of White Plains, New York v. Oglesby*, 270 App. Div. 136, 58 N.Y.S.2d 591 (2d Dep't 1945) or otherwise if the attorney he associates with had express authority and he can prove it. See Point 8D. If he is an equitable assignee (See Point 5) he can enforce his rights by his own by a direct action (*Harwood*) or indirectly by joining in the proceeding with the holder of a statutory lien. *Application of Peters* 271 App. Div. 518, 67 N.Y.S.2d 305 (3d Dep't 1946) aff'd 296 N.Y. 974, 73 N.E.2d 560 (1947); *Woodbury v. Andrew Jergens Co.*, 69 F.2d 49 (C.A. 2 1934); or by having his services evaluated in the same hearing in which the value of the common law retaining lien holder's services are considered. *Roskind v. Brown, 29 A.D.2d 549, 285 N.Y.S.2d 410 (2d Dep't 1967); Harwood, supra*; *Reilly v. Millcount Realty Corp.*, 419 N.Y.S.2d 644 (App. Div. 2d Dept. 1979).

Second, an "of counsel" attorney may not, *arguendo* proceed against the client if the retained attorney did not have, or if the "of counsel" attorney is unable to prove, that the retained attorney had express sub-retention authority. See cases cited Point 8D. *infra*. Neither principle is at issue in this case because Nelipowitz is the Attorney of Record who appeared and whose statutory lien secured the equitable assignment (A-12). *Robinson v. Rogers*, 237 N.Y. 467, 143 N.E. 647 Mot. to dismiss app. den. 237 N.Y. 525, 143 N.E. 728 (1924); *Sargent v. McLeod*, 209 N.Y. 360, 103 N. E. 164 (1913).

Third, division of fee agreements [where the person promising to pay is obviously the client] are clearly lawful in New York. See N.Y. Jud. L. § 491;.*Sterling* and *Jontow, supra*. On the other hand, an "of counsel" attorney may not proceed against the client if the contract provides exclusively for payment to the retained attorney. *Fried v. Cahn*, 239 App. Div. 213, 267 N.Y. Supp. 182 (1st Dep't 1933). Ethically the client is to be informed of a division of fee with anyone other than a partner or associate *of* his law firm DR-2-107 (A). And the agreement at bar says Schaefer itself will pay "the collectively referred to attorney". (A-12)

Roskind actually illustrates how the "of counsel" attorney's rights may be enforced indirectly. Should there have previously been any reasonable doubt as to the right of an "of counsel" attorney to personally defend his rights, they were clearly put to rest *in the same Second Department* in 1979 after the decision below. See *Reilly v. Millcount Realty Corp.*, 419 N.Y.S.2d 644 (App. Div. 2d Dep't 1979) in which the Second Department clearly did not manifest any objection to an "of counsel" attorney doing so and ordered a hearing on the value of the "outgoing attorneys' services" (*Id* at 646) which clearly included both Respondent law firms "Kramer, Dillof, Tesel, Duffy & Moore, Respondent" *Id* at 644, and "Daniel Kramer, New York City, *of counsel*), respondent" and whose services, like those of Mr. Blumberg and Mr. Lederberg in *Roskind* were to be valued at one hearing.(*Id at 646) again in a pre-settlement, pre-judgment common law retaining lien case like Roskind.* There was no mention of the obvious contingent fee agreement equitable assignment that could not come into fruition in *Reilly*. See Point 8 generally and particularly at Point 8C. for a discussion of *Roskind*.

In Point 5 *supra*, we discussed the inconsistency and lack of uniformity in the Second Circuit arising in this case but obscured from public view by the failure of the Opinion to fully disclose the "collective attorney" clause at issue (or that Petitioner also demanded reformation, if necesary to place on the record the full and complete agreement). Yet another lack of uniformity and inconsistency now exists within the Second Circuit. The District Court Opinion, by claiming an "of counsel" allegation to be insufficient, is wholly inconsistent with the Second Circuit's own reliance on *Harwood, supra, Barnes v. Alexander*, 232 U.S. 117, 34 Sup. Ct. 276 (1914) and *Archibald v. Panagoulopoulos*, 233 N.Y. 478, 135 N.E. 857 (1922) in *Woodbury v. Andrew Jergens Co.* , 69

F.2d 49 (C.A.2 1934) and *Walker v. Hartford Realization Co. Inc.*, 74 F.2d 56 (C.A. 2 1934). Note that Mr. Spanos was an "of counsel" attorney. See also the other *Spanos* inconsistencies discussed in Point 13 at pp. 111-115.

As to the Opinion's objection to the absence of an allegation that Nelipowitz was "co-counsel"(A-6) to further bolster its ill-founded conclusion, no case in New York has ever required such an allegation. And Nelipowitz did allege "*we would undertake the case* for a 33 1/3% contingent fee" (A-33, par. 3) and "*Christo and myself agreed* to conduct this action for a 33 1/3% fee (A-33, par. 4). (emphasis supplied) and the Record contains the Christo acknowledged Joint Retainer Agreement (A-12).

At the commencement of this case which was filed September 1, 1978 Nelipowitz alleged "I am the attorney of record for plaintiffs (A-32, par. 1). Christo, in turn, erroneously claimed he was the attorney of record, initially. Schaefer claimed Nelipowitz was not retained. And Nelipowitz on February 17, 1979 then briefed *Harwood, supra* (R-276, at p. 23 (and again at p. 40 on the *Beecher* issue because, an equitable assignment was involved). And *Harwood* expressly says "It [is] not important for the [attorney] to show that the agreement was made with the [clients]. *Id 540).*

The Opinion plainly avoids discussing Nelipowitz's actual allegations taken in context, first minimizing his primary allegation "I am the attorney of record for plainitiffs (A-32, par. 1) (a common way of submitting affidavits in New York practice), overemphasizing a secondary allegation merely describing his general "of counsel" relationship to Christo which pre-dates any connection Nelipowitz had to Schaefer (A-33, par. 3) and by ignoring "[Christo and Nelipowitz] agreed [they] would undertake the [Schaefer] case" (A33-par. 3). In fact Nelipowitz never alleged, nor indeed was given the promised opportunity to allege his relationship to Schafer after the Judge Motley, on January 26, 1979 said "[W]e will hear how you got retained and that kind of thing later" (R-309, p. 27). The Court proceeded to ignore that Nelipowitz alleged having filed the Complaint "upon receiving Schaefer's instructions to commence suit" (A-35, par.6) and that Schaefer authorized Christo "to use [all too prophetic] the services of such other attorneys as he chose to associate *with* him" (A-34, par. 5). Compare the same Joint Retainer agreement word (A-12). And all of those allegations were made more than 5 months before (A-44) Christo produced the Joint Retainer Agreement on January 15, 1979 (R-258,259) which was not previously in Nelipowitz's possession.

In fact the first mention of the words "co-counsel" in either this case or any possibly relevant New York case we could find is in Judge Motley's opinion below. And the word "direct" never even became an issue in this case until Judge Motley issued her Opinion on March 16, 1979 two months later. Even Joint Retention was not made an issue until March 17, 1979 (R-294 at pp. 3,6,11, & 13) when Petitioner Moved for Judgment As To The Value of Petitioner's Attorney Lien Value which Motion was never heard by the District Court.* And the Joint Retainer Agreement produced by Chisto and unchallenged by Schaefer says "client[s] hereby agree to retain ... attorneys ...(hereinafter referred to collectively as 'the attorney'...." (A-12) *We observe that both Schaefer corporations and both EDS corporations understand the ordinary meaning of the words "collectively herein referred to"*(A-17).

When the Petition was filed on September 1, 1978 (R-240) the Joint Retainer Agreeent containing the "collective attorney" clause (A-12) was not in Nelipowitz's possession. Christo put it on the record on January 15, 1979 (R-259) long after he and Mr. Vumbacco (Schaefer's then internal general counsel) referred to it on September 22, 1978 (A-83, par.1; A-85, Par.2) and after Nelipowitz had already said [without having the agreement and in response to Christo's and Vumbacco's claims] "it was intended to confirm earlier verbal agreements and may well be an incomplete expression thereof" (A-68).

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*It, and the Opinion, crossed in the mail.

See also N.Y. Jud. L.§474 which permits attorneys *or counsellors* to have either express or implied compensation agreements and §491 permitting fee divisions.

For the foregoing reasons the Opinion's claim that an "Of Counsel" allegation is insufficient is substantively contrary to *Roskind* on which it relies and to the actual allegations' and admitted facts on the record, and is wholly unsupportable in New York law or on the facts of this case.

POINT 8

Thelaw of New York concerning attorney retention arrangements does not depend on labels such as direct, indirect, co-counsel, assistant counsel, attorney of record, trial counsel or any other label alleged. In New York retention arrangements (and client liability) depend soley on the attorney's *authority* to do the act in question (or his ability to prove that authority).

8A. The theory of the Opinion that the New York courts have imposed a "direct retention" rule on the lien statute is not true. The governing compensation and lien statutes are plain and clear. Said theory of the Opinionis contrary to New York law as declared by the New YorkCourt of Appeals. Under New York law as so declared it is not important that an attorney show the agreement with the client was made directly

> **provided he was employed pursuant to an agreement made with the client's *authority*.The New York remedial statutory lien statute must be construed liberally [for the benefit of attornerys]. Schaefer, a client must, but did not here, allege that Petitioner was not the Attorney of Record or lacked authority to appear or that the Joint Retainer Agreement was excessive, or obtained by mistake, false representation or undue advantage or that Petitioner Nelipowitz lost his authority to appear, or that he waived his lien or that the statutory "proceeds" do not exist. Thus, Schaefer never alleged any proper ground, other than the purely factual issue of purported *non*-retention which has never been litigated, on which to dismiss the Petition of Petitioner Nelipowitz as against Schaefer. Neither the New York courts, nor the Federal Courts below which must comply with New York law, may in the absence of proof a fee agreement was improperly obtained, disregard it. Federal Courts are obliged to follow state law. 28 U.S.C.A. 1652.**

Federal courts will not read exceptions into statutes that are plain on their face. *Stuyvesant Insurance Co. of New York v. Nardelli*, 286 F.2d 600, 605 (C.A. 5 1961); *Hollywood Golf Estates, Inc. v. Nello Teer Co.*, 353 F.2d 485, 489 (C.A.5 1965). Here, the governing statutes are plain and clear:

> The compensation of an attorney or counselor for his services is governed by agreement, express or implied which is not restrained by law. . . .N.Y. Jud. L. §474.

> **[Sec. 491] does not apply to an agreement between attorneys . . . to divide . . . the compensation . . .**

> From the commencement of the action...the attorney who appears has a lien.... N.Y. Jud. L. §475.

The Opinion with no precedent supporting it, was suddenly issued without any hearing on the facts and dismissed the Petition with actual prejudice as to all six respondents on the express but wholly unsubstantiated theory that the New York Courts had somehow imposed on the statute (without any recognition of the relationship between the three separate statutes—See Point 8B.) a requirement that for "enforcement of a statutory attorney's lien" the attorney must "be directly retained by the client and not merely of counsel to the retained attorney" (A-4,5,6,7).

In law and fact no New York court has ever so held or even so stated in dicta and an interpretation to that effect of *Roskind v. Brown*, 29 A.D.2d 549 (2d Dep't 1967) is flatly contrary to *Harwood, infra*, a N.Y. Court of Appeals decision which expressly says "It was not important [for the attorney] to show that the agreement was made directly.... It was sufficient that he was employed ... with ... authority...." The Opinion is also contrary to *Roskind* itself which actually holds that the services of the "of counsel" associates were to be considered in determining the value of Mr. Glazer's common law retaining lien.

The Opinion's claim that "direct retention" is reqired is also inconsistent with interpreting the statutory provision liberally as is required of remedial legislation which broadened the Attorney of Record's rights beyond the limitations of the common law retaining and charging liens. See *Robinson v. Rogers*, 237 N.Y. 467 Mot. to dismiss appeal den. 237 N.Y. 525 (1924); *Fischer-Hansen, infra* Point 10. And careful analysis shows that *Harwood, Roskind, Mitchell,* and *Kelly* and all New York cases turn on one fundamental question in each case—to wit—*authority.*

Before a client can refuse to pay an attorney it must first allege either that the attorney does not have authority to appear *Kelly, and Mitchell, infra*, Point 8B. or that the Joint Retainer Agreement (A-12) was obtained by fraud, or that, in this case, the one-third (33 and 1/3%) contingent fee was so excessive as to evince a purpose to obtain improper or undue advantage (*Matter of Fitzsimmons*, 174. N.Y. 15,24, 66 N.E. 554 (1903) or obtained by, fraud, mistake, false representation, or other unfair inducement. *Audley v. Jester*, 148 App. Div. 94, 132 N.Y. Supp.1061 (1st Dep't 1911) aff'd 212 N.Y. 573, 106 N.E. 1032 (1914); *Ransom v. Cutting*, 188 N.Y. 447, 81 N.E. 324 (1907); *Sasson v. Ferris*, 231 App. Div. 524, 248 N.Y.S. 125 (1st Dep't 1931). And even New York courts [much less Federal Courts obliged to apply state law (28 U.S.C.A. 1652)] have no power, in the absence of proof that a fee agreement was improperly obtained, to disregard it. *Murray v. Waring Hat Mfg. Co.*, 142 App. Div. 514, 127 N.Y. Supp. 78 (2d Dep't 1911); *;Sasson, supra Application of Peters*, 271 App. Div. 518, 67 N.Y.S.2d 305 (3d Dep't 1946) aff'd 296 N.Y. 974, 73 N.E.2d 560 (1947).

Our research of New York law leads us to conclude that the only grounds on which New York courts or even Federal Courts have ever refused to enforce an alleged New York *statutory* charging lien are as follows: (i) if it is shown that the Petitioner/Plaintiff attorney is not the Attorney of Record of which *Roskind* is an example but only as to Mr. Glazer and then only because he had not appeared [but whose common law retaining lien was nonetheless fully enforced covering him and "his associates"]; (ii) if it is shown that the Attorney of Record lacked authority to appear (*Kelly, infra* Point 8B.) or lost the authority to appear after retention (*Mitchell v. Mitchell*, 143 App. Div. 172 (2d Dep't 1911) [and the Second Department never reached and could not reach either question in *Roskind* as to Mr. Blumberg whose authority to appear may or may not have expired prior to Mr. Glazer's discharge and whose services were in any event to be considered in the same hearing and as a part of determining the value of Mr. Glazer's common law retaining lien when the equitable assignment lien could not come into fruition].; (iii) where the proceeds do not or cannot come into existence such as in *Desmond v. Socha*, 38 A.D.2d 22 (3d Dep't) 1971 aff'd 31 N.Y.2d 687 (1972) but which preserved the attorney's right to bring a plenary action and did not dismiss the attorney with prejudice as against the client or in *Goodman, Goldstein, infra* Point 8D.; (iv) if the Attorney of Record waived his lien *Marsano v. State Bank of Albany*, 27 A.D.2d 411, 279 N.Y.S.2d 817 (3d Dep't 1967) or where there was a superior federal lien *Malman v. United States*, 207 F.2d 897 (C.A.2 1953) resting on the Federal Set Off and Tucker Acts and which, at least in part, under the Federal Conformity Law 28 U.S.C.A. 1652 may no longer apply in New York. See *In Re Washington Square*, 5 N.Y.2d 300, 314, 157 N.E.2d 587 (1959) cert. den. 363 U.S. 841 (1960) [and defendants EDS are not the United States and we do not petition here to argue the Tucker Act].

The foregoing sets forth the basic law of New York; and proper pleading by an adversary client.. Schaefer alleged *non-retention* i.e."Schaefer never retained Mr. Nelipowitz" (A-92). As to Schaefer's *non* retention, see Point 4, dealing with the irreconcilable error below. Schaefer never contradicted Nelipowitz's allegations "I am the attorney of record for [Schaefer] in this action, . . ." or that he acted under Schaefer's instructions, or that Schaefer authorized Christo to associate with other attorneys (A-32-35, par. 1, 6, 5). Schaefer never contradicted Nelipowitz' actual claims. Schaefer clearly never claimed either that Nelipowitz had not appeared or that he lacked authority to appear. (A-92).

Accordingly, the Opinion's "direct retention" theory was in error, the governing statutes and New York case law are plain and clear. The theory of the Opinion that the New York Courts have imposed a direct retention rule on the Statute is contrary to New York law as declared by the Court of Appeals thereby violating the Federal

Conformity Law (28 U.S.C.A. 1652) and by so doing violated Nelipowitz's Constitutional rights to equal protection under the law and due process because it squarely failed to apply the law of New York as declared by its statutes and highest Court and never made any findings of fact and never granted Nelipowitz a hearing in the equitable ancillary proceeding he brought pursuant to §475 of the N.Y. Jud. L. to determine and enforce his statutory charging lien that arose on his appearance for Schaefer. (*Id)**.

8B. The Opinion fails to follow N.Y. Jud. L. §§474 and 475, *Harwood, Sargent, Robinson* and *Kelly* because it is factually erroneous, because Nelipowitz was jointly retained and had clear authority to appear, fails to recognize that a compensation agreement may be express or implied, that retention authority and authority to appear are not the same or to recognize the distinction between agreements permitted under §474 from the lien that arises under §475, and that the statutory charging lien does not spring from the contract, but rather from the statute and secures the compensation. In New York *retention need not be direct.* The Opinion is contrary to three different N.Y. Court Of Appeals cases, §§475 and 474 and *Kelly* (In addition to the *Fischer-Hansen, In Re Niagra, L. O. Power Co.* and *Beecher* errors discussed in Points 4, 9, 10 and 11, all in violation of the Federal Conformity Law. (28 U.S.C. A 1652.)

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*Much controversy ensued below as to the timing of the scheduled hearing that was never held and who (among Christo and Nelipowitz) was ready to proceed and, in context, no indication of whether Schaefer would or would not be required to participate in any such hearing. It is entirely posible that a cause of the District Court's error was irritation at Nelipowitz's insistence on prehearing discovery and that Schaefer be a party. See Statement of the Case, Procedure.

The Opinion asserts that "To enforce an attorney's lien in New York State, the petitioner must not only show that he was attorney of record, but must also have been *directly* retained by the client. It is not sufficient to allege that Petitioner was 'of counsel' to the retained attorney. *Roskind v. Brown,* 285 N.Y.S.2d 410 (App. Div.2d Dep't 1967). "(A-4,5) (emphasis supplied). But the statute says "the attorney who *appears* ... has a lien...." §475. Compare S.D.N.Y. Rule 3(c). "Only an attorney ... of this court may enter appearances...."

The Opinion is factually erroneous.

> **Broadly stated Schaefer agreed "to retain ... Christo ... *and* such *other attorneys* as he may choose to associate with him, (*hereinafter referred to collectively as 'the attorney'*)...." (A-12). More particularly, Schaefer permitted Christo to choose the attorneys who would be *directly retained and directly paid by Schaefer pursuant to that agreement*, And Christo's reasons for that arrangement, although not admitted by Christo and Schaefer, is in the Record—See A-33, par.3; A-46 par.2. *The agreement actually provides "client[s] hereby agree to retain* ... attorneys ... (hereinafter referred to collectively as 'the attorney')...." And in Paragraph 2. of that agreement Schaefer agreed to pay "the attorney" so defined. *Id***

In addition, approximately eight days prior to suit, Schaefer specifically instructed that Nelipowitz, a New York attorney, be Attorney of Record (A-34; A-35, par. 6; A46-49, par.4-16; A-34, Par.5; when Schaefer accepted the outstanding offer to so act (A-47, par.9; A-74, par. 8,9 and 10).

Schaefer never claimed Nelipowitz lacked authority to appear or to commence the action for Schaefer (A-

85,87-91,92-94). In New York "It [is] not important for the [attorney] to show that the agreement was made *directly* with the [client].... It [is] sufficient that he was employed under the agreement made with ... the *authority* of ... [the clients]...." *Harwood v. LaGrange*, 137 N.Y. 538, 540 (1893)(emphasis supplied).

The existence of the *statutory* lien depends "upon the attorney's *authority* to begin suit, and an attorney asking for that protection should be in a position to satisfy the Court of his authority." *Kelly v. New York City Ry. Co.*, 122 Ap. Div. 467, 106 N.Y. Supp. 894 (2d Dep't 1907) (emphasis supplied). Nelipowitz did so. He alleged Schaefer's knowledge and grant of authority to Christo to "associate with him (A-34, par. 5; Compare A-12; See *Rizzi v. City of New York*, 51 A.D.2d 906, 380 N.Y. S2d 697 (1st Dep't 1976); *Application of Peters*, 271 Ap. Div. 518 (3d Dep't 1946) aff'd 296 N.Y. 1974 (1947) and Schaefer's instructions (A-34,35, par.6) and also see the Taylor Affidavit (A-46-49, par. 9 and 4-16) and A-74, par. 8-10) and that "plaintiffs at all relevant times authorize Christo to use the services of other attorneys as he chose to associate *with* him", etc. (A-34, par. 5). Christo admits that he asked Nelipowitz to sign the Complaint (A-83, par.4; A-99, par. 19). While *Kelly* mentioned that Plaintiff's non-retention allegation therein (l06 N.Y. Supp. at 895), it is crystal clear that the Second Department held that it was the absence of "authority to commence the suit that defeated the statutory lien (*Id* at 896) and it has long remained the law of New York.

The difference between retention and authority to commence suit was illustrated four years later in the same Second Department where the authority to commence suit was withdrawn after retention but prior to suit. *Mitchell v. Mitchell*, 143 App. Div. 172, 127 N.Y. Supp. 1065 (2d Dep't) 1911). *Roskind*, decided by the same Second Department, does not suggest in any way that it was overruling either *Kelly* or *Mitchell* or departing in any way from the *Harwood* rule that it is not important to show that the agreement was made directly with the client and that *it is sufficient* if the agreement is made with the authority of the client. (*Hardwood* at 546). And *Kelly* was briefed in *Roskind.* See Roskind Record on Appeal, Altman brief, p. 9 in the Supplemental Appendix, a copy of which is lodged with this Court.See also Point 3.

What the Federal Courts below failed or refused to recognize is that any attorney-client relationship involving litigation may easily contain four or more separate "authority" components, for example direct or indirect retention, authority to appear, authority concerning the attorney(s)' compensation or the construction of the payment obligation in the particular compensation agreement* and authority to negotiate settlements, eg. *Roskind.*

In law, in New York sub-retention authority may not be implied (See Point 8D. *infra*). However, compensation agreemeents of an "attorney or counsler" may be express or implied (N.Y. Jud.L. §474). In this case Schaefer's agreement to pay 'the attorney', as defined, is express (A-12). Moreover, the Opinion fails to distinguish the compensation agreements (A-12, par.2; A-14; A-33, par.4 A-35, par.7 and 8) permitted under §474 from the lien which arises from the statute by appearing and a client may not disregard that agreement (A-12). See cases cited Point 8A. §475.

The lien does not spring from the [compensation] contract (permitted by §§474 and 491) but from the statute(§475) *Robinson v. Rogers*, 237 N.Y. 467, 143 N.E. 647 Mot. to dismiss appeal den. 237 N.Y. 525 (1924) and secures the compensation *Id, Sargent v. McLeod*, 209 N.Y. 360, 365, 103 N.E. 164 (1913). And the Federal Courts below failed to recognize the distinction between express retention agreements made with proper *authority* (*Harwood* at 540), and compensation agreements, express or implied, which are not restrained by law (see

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*Compare *Fried v. Cahn*, 239 App. Div. 213, 267,N. Y, Supp. 182 (1st Dep't 1933). See also N.Y. Jud. L. §491

N.Y. Jud. L. §§474 and 491) and which obviously must be made with proper authority (*Harwood, supra*) under §474 from the statutory lien arising from an appearance and pursuant to §475 and that the statutory lien secures the compensation.

The dismissal of Nelipowitz's Petition with prejudice as to Schaefer* is erroneous because it denies both his statutory lien right (including his statutory right to follow the "proceeds ... in whatever hands they may come") (§475) (including Christo's) and denies all of same *with prejudice* and without any qualification thus either also denying or beclouding Nelipowitz's equitable assignment rights against Schaefer* and Watson* contrary to *Harwood, supra,* and without any hearing or other due process.

As to the additional prejudice to Nelipowitz under *Fischer-Hansen* by the Opinion's dismissal of Defendants EDS see Point 10 *infra* . As to the other fatal irreconcilable error under *In Re Niagra L. & O. Power Co.* see Point 4 *infra.* And in the final analysis retention and appearances and compensation rest on one principle——

And Watson—who, below, merely "piggybacked" Christo's pleadings except for an initial pleading claiming he never got any of the "proceeds" (A-86, par.5), which is a fact in dispute (A--55, par. 2), refuses to explain his knowledge as to how Schaefer's settlement proceeds that Christo admits receipt of (A-106, par. 42) were distributed while he was an associate of the firm [he became a partner five weeks later (A-86, par. 1)] also has yet to explain whether he receieved any part of the $55,000 advance Schaefer paid Christo (A-106, par.42) which was clearly treated as an advance and as a part of Schaefer "proceeds"('Id*) in light of the 1,983 hours of work Christo claims he did (A-104, par.37) while he was an "associate in the employ of Christo" (A-86, par.1) and Christo received money from Schaefer for "maintenance of overhead" (A-106, par.42). Watson's failure to recognize that he also was an equitable assignee *pro tanto* under the Joint Retainer Agreement (See Point 5) doesn't alter the fact that Schaefer and Christo treated those payments as advances. Mr. Watson is plainly either Mr. Maintenance and Overhead or received part of the statutory "proceeds" or both.'

authority. Harwood, Application of Peters, Roskind, Kelly and Mitchell, supra and the Opinion is squarely contrary to three leading N. Y. Court of Appeals cases—*Harwood, Robinson* and *Sargent, supra,* and contrary to the Federal Conformity Law (28 U.S.C.A. 1652), and the Points set forth in the heading of this point B are all correct.

8C. The Opinion's interpretation of *Roskind* is clearly erroneous. *Roskind* and *Harwood* are consistent both with each other and the New York rule that client liability depends solely on the attorney's *authority* to do the act in question (and be able to prove that authority).

Both *Harwood* and *Roskind* involved, respectively, Plaintiff and Respondent attorneys who did not hold *statutory* charging liens. There is also a fundamental difference between *Harwood* and *Roskind* in that *Harwood* enforced an equitable lien of an attorney that had come into fruition whereas *Roskind* enforced a common law retaining lien where the equitable assignment could not come into fruition. In the case at bar Nelipowitz asserts his statutory charging lien and his equitable assignment has come into fruition .

Nelipowitz here asserts his statutory lien on the proceeds against client Schaefer, co-counsel Christo who admits receipt of some of them (A-106, par. 42) and against his associate, Watson*, who denies their receipt (A-86, par.5) which is controverted (A-55, par. 2,3).He also asserts it against Defendants EDS. See Point 10.

Roskind is wholly consistent with *Harwood.* Both held that on remission the value of the services of the three lawyers should be proved at one hearing. *Harwood v. LaGrange,* 137 N.Y. 538, 542 (1893); *Roskind v. Brown,*

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*See fn. Point 8B. *supra* .

29 A.D.2d 549, 285 N.Y.S.2d 410, 412 (2d Dep't 1967). We do not consider the *Roskind* opinion to be a model of clarity. That lack of clarity may well have caused the error below. But when *Roskind* is read together with its Record on Appeal (See Supplemental Appendix, a copy of which is lodged with this Court) *Roskind* is clear and correctly decided. We completely agree with *Roskind* and, properly understood, it completely supports our position that this ancillary case should be decided in the very forum where the main action arose.

But the Opinion is squarely opposed to *Harwood* which held that "It was not important for the [attorney] to show that the agreement was made *directly* with the [clients]. . . . It was sufficient that he was employed under the agreement made with. . . the *authority* of those [clients]. . . ." *Harwood* at 540. The Opinion's error is manifest in its inaccurate and incomplete quotation of *Roskind* and demonstrated in the Opinion's own bracketed language. First, we submit that the *Roskind* language quoted in the Opinion (A-5) commencing with "any determination. . . fixing his fee" which the District Court read as "Glazer's fee" and which also went to the question of determining the value of Mr. Glazer's common law *retaining* lien where the contingent equitable assignment fee agreement protected by the retaining lien could not come into fruition must be considered in light of the words appearing in the sentence immediately before the Opinion's quoted words and which say "we are of the opinion that a hearing on that issue (date of discharge). . . at which all relevant proof on such issue *and on the services* and disbursements incurred by respondent *and* his *associates*. . . may be presented" (emphasis supplied)*.

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*In New York the difference between a weak common law lien and the remedial powerful statutory charging lien does not lie in authority differences. If authority is absent neither exists. The retaining lien rests on possession of the client's property, papers, etc. acquired by reason of services. The statutory lien rests on the appearance made with authority to do so.

In the other bracketed language "attorneys of record" (A-5) the Opinion below erroneously characterizes Mr. Lederberg as an Attorney of Record. Mr. Lederberg never appeared in the *Roskind* case and never claimed he was an attorney of record.

In *Roskind* the actual facts were as follows. Mr. Ledeberg clearly was *sub-sub-retained* but had met Mr. and Mrs. Roskind. *Roskind Record on Appeal* (hereinafter RRA) 5. He was actually an associate *of* Mr. Blumberg (RRA 18). Mr. Blumberg purportedly filed a separate retainer statement (RRA 14) [not an agreement]. (There are special rules in New York requiring the filing of Retainer Statements with the N.Y. Judicial Conference in connection with personal injury cases.) The Roskinds claimed they never saw, spoke to, or knew Mr. Blumberg was in the case(RRA 28). It was "Blumberg's office" which was "of counsel" to Mr. Glazer (RRA 14,26) and who had been asked "to act as associate counsel" (RRA 19). In *Roskind* two retainer *statements* were filed with the Judicial Council. But it does not appear that Mr. Roskind actually ever signed two retainer agreements. If there had been two separate retainer agreements the second one clearly would have been with Mr. Blumberg's firm and Mr. Roskind could not have successfully claimed he never heard of Mr. Blumberg. In the case at bar compare the Joint Retainer Agreement (A-12), the Nelipowitz affidavits (A-34, par. 5 & 6; A-74, par. 8-10) and the Taylor Affidavit (A-46-49, par. 9, 4-16).

The *Roskind* Record on Appeal clearly shows that Messrs. Lederberg and Mr. Blumberg filed affidavits in support of Respondent Glazer's opposition to a requested Substitution Order. [If Schaefer's other attorneys had done exacly that as they were required to do under S.D. Rule 4(c) in the main action this ancillary case would not have arisen.] What really happened in *Roskind* is that the Second Department converted Mr. Glazer's demand (supported by Mr. Blumberg's and Mr. Lederberg's similar affidavits) for a future fixed and contingent fee

(RRA 18,25 & 28) into a conclusion that present compensation should be paid, determined quantum meruit. Such is appropriate in a pre-settlement discharge-substitution situation (which this case is not) when the equitable assignment lien cannot come into fruition. In New York in a pre-judgment- or pre-settlement-discharge-substitution situation, either the client or the attorney may seek a determination of present compensation. It is frequently held (in the context of two potentially conflicting retentions and two potentialy conflicting statutory or common law retaining liens arising out of substitutions that if future compensation is sought, it should be determined at the end of the case. *Bradbury v. Farber*, 31 A.D.2d 824, 298 N.Y.S.2d 29 (2d Dep't 1969); *Reubenbaum v. B. & H. Express, Inc.*, 6 A.D.2d 47, 174 N.Y.S.2d 287 (1st Dep't 1958); *Paolillo v. American Export Isbrandtsen Lines, Inc.*, 305 F. Supp. 290 (D.C. S.D. N.Y. 1969)*.

In *Roskind* Mr. Glazer and his "of counsel" associates attempted to mix the usual, but separate, present or future compensation rules together. Messrs. Glazer, Blumberg and Ledererg initially sought a 50 per cent division of the [more or less standard] one third fee with Mr. Altman (RRA 12,17,23, &30); his successor. After the motion for substitution was filed (and due to a settlement offer obtained from an insurer, possibly after Mr. Glazer's discharge date) they then sought the entire 1/3 fee on the amount of the settlement offer plus 20% of

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*In New York, upon discharge attorneys may always elect present and immediate compensation. *Fischer-Hansen, Reisman, LaFetra, Ozorowski, infra* Point 9, *Audley,supra*, *Baxter v. Connor*, 119 App. Div. 450, 104 N.Y. Supp. 327 (2d Dep't 1907); *Brown v. Brown*, 272 App. Div. 936, 72 N.Y.S.2d 142 (2d Dep't 1947); *Holder v. New York City Transit Authority*, 4 Misc.2d 10, 946 (Sup. Ct. N.Y. Co. 1956); *In Re Montgomery's Estate*, 272 N.Y. 323, 6 N.E.2d 40 1936); *Morehouse v. Brooklyn Hts. Ry.*, 123 App. Div. 680, 108 N.Y. Supp. 152 (2d Dep't 1908) aff'd 195 N.Y. 537, 88 N.E. 1126 (1989); *Murrray v. Waring Hat Mfg. Co.*, 142 Ap. Div. 514, 127 N.Y. Supp. 78 (2d Dep't 1911); *Matter of Tillman*, 259 N.Y. 133,, 181 N.E. 75 (1932); *Matter of Krooks*, 257 N.Y. 329,, 178 N.E. 548 (1931).]

the net attorney fee on the amount Mr. Roskind might thereafter recover in excess of the settlement offer (RRA 18,25 &27) all to be paid at the end of the case. The Second Department simply ruled present compensation quantum meruit up to the date of Mr. Glazer's discharge for the services of all three attorneys; Glazer and his "of counsel" associates. The confusion in *Roskind* was because Mr. Glazer, who never appeared, certainly erroneously claimed, and Mr. Lederberg apparently also erroneously claimed that Mr. Glazer was the Attorney of Record based on Mr. Glazer's retainer agreement. That was clear error because Mr. Glazer had never appeared. See N.Y. Jud. L. §475; *Weinstein, supra.*

In addition to the Opinion's error in claiming that a petitioner must "have been directly retained" (See Point 8A. and 8B.) the Opinion further claims "It is not sufficient to allege that Petitioner was 'of counsel' to the retained attorney." (A-5) *Roskind* does not stand for either proposition. See also Point 7 *supra.* If anything *Roskind* held in enforcing Mr. Glazer's common law retaining lien that Mr. Blumberg, a clearly sub-retained "of counsel" attorney (RRA 19) who might have been an Attorney of Record, and Mr. Lederberg who was an associate of Mr. Blumberg (RRA 18) need not show direct retention for the value of their services to be considered in determining the value of Mr. Glazer's common law retaining lien. And it did so in the face of Mr. Roskind's claim that Mr. Roskind never saw, spoke to, or knew bMr. Blumberg was in the case (RRA 28). *Roskind* actually held that regardless of whether Mr. Blumberg was possibly entitled to a statutory lien, Mr. Blumberg and his associate, Mr. Lederberg must demonstrate the value of their services in the same hearing as Mr. Glazer, and that said hearing would be dispositive of the rights of all three attorneys. We don't even disagree with that holding. It was perfectly appropriate, under New York law on the *Roskind* facts in either a common law retaining lien or statutory charging lien pre-settlement-pre-judgment-discharge situation where the equitable assignment lien can not come into fruition; a garden variety case and result in New York.. And that solution in the *Roskind* case was entirely consistent with *Harwood* (which had no direct need to concern itself as to the common law retaining lien as to the proceeds that were in the hands of a Trustee—(*Harwood* at 539) and which also held the value of the services of the three attorneys "should be tried again" by the court below. *Harwood* at 542. Compare also *Reilly, supra* — another multi non-disputant attorney case like *Roskind*, *Application of Peters*, and *Woodbury, supra*..

Roskind by-passed three different questions of the authority of Mr. Blumberg (or his office including Mr. Lederberg which was "of counsel" to Mr. Glazer (RRA-14,26) to, as the case may be, be sub-retained, appear, or conduct settlement negotiations, perhaps due to Mr. Roskind's admitted knowledge of Mr. Lederberg (RRA 5), but in any event notwithstanding Mr. Roskind's claim he had never heard of Mr. Blumberg (RRA 28).*

The Second Department never discussed the "no implied sub-retention authority" rule.(See Point 8D.). *Direct v. indirect retention* was never even mentioned in *Roskind**.

More importantly, said three authority issues were all inextricable from the discharge date dispute (Compare *Kelly* and *Mitchell, supra* Point 8B.) which could not be resolved in the Second Department and was to be resolved on remission (*Roskind*, 285 N.Y.S.2d at 412) and which would control both whether Blumberg had authority to appear or negotiate the settlement. (Sub-retention authority was not even discussed much less treated as an issue by the Second Department.*) But the

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*In New Yorklaw *Roskind* appears to be avery liberal "pro-attorney" case, as required by *Fischer-Hansen, supra*. *Roskind* may well be the only New York case that ever enforced a retaining lien for the indirect benefit of an attorney (Blumberg) that the client claimed he never heard of without commenting on such allegation beyond the mere mention of it.

discharge date dispute would also clearly have controlled the extent of Blumberg's services to be considered on remission. This is so because if Mr. Blumberg had appeared before Mr. Glazer was discharged Mr. Blumberg's services, from the time of his appearance to the date of Mr. Glazer's discharge would still be considered quantum meruit (and there was no conflict among Messrs. Blumberg, Glazer and Mr. Lederberg). If, on the other hand, Mr. Blumberg appeared after Mr. Glazer's discharge, his services between discharge and appearance and after appearance were not to be considered at all (entirely consistent with *Kelly* and *Mitchell* which recognized the difference between non-retention and authority to appear and *Harwood* which expressly turns on *authority*) beause Mr. Blumberg's authority to appear or to be sub-retained or to do any thing at all would have, by Mr. Glazer's discharge, expired before the appearance and on the discharge date. So also would any authority of Mr. Blumberg or Mr. Lederberg to conduct settlement negotiations have expired on the discharge date.

Mitchell, in the same Second Department appears to be the only other New York case that ever had to recognize the distinction between an authorized retention and an unauthorized appearance.

For all of those reasons, by enforcing Mr. Glazer's common law retaining lien, the Second Department never needed to reach any question of what was required by §475 other than that Mr. Glazer had never appeared.

Moreover, the "dispositive" language in *Roskind*, quoted by the Opinion(A-5) must be viewed at least partially as dicta since there never was a conflict among Messrs. Glazer, Blumberg and Mr. Lederberg. *Roskind* merely held that the services and disbursements of all three attorneys in a pre-settlement- pre-judgment-discharge-substitution situation, which this case is not, and where the equitable assignment lien could not come into fruition, were to be considered and that the determination of same would be dispositive of the rights of all three. We don't even disagree with that holding. It was perfectly appropriate on the *Roskind* facts. On the other hand we think the "dispositive" language is not dicta when it said the services all three attorneys should be presented and determined in one hearing, consistent with all the other New York cases involving disputes between an attorney and the client andwhere the client was multiply represented i.e. in one forum. Patently, if the multiple lawyers'services must or may be evaluated quantum meruit as is frequently the case, or occurs when the lawyer elects to proceed quantum meruit and not on the agreement, when the equitable assignment cannot come into fruition, then the rule that multiple attorneys' services must be evaluated in one hearing makes eminent sense. But here *the equitable assignment has come into fruition* and one of the "multiple attorneys" demands pursuant to his statutory right to petition (§475) that the Court determine the value of that settlement which is the amount to which the equitable assignment provisions must be applied to determine the fee due to the multiple attorneys ,and then, once it is properly determined in accordance with New York law, to divide it as required by New York law. See *Sterling* and *Jontow, supra* Point 3. [And apart from non-payment the chief issue between Christo and Nelipowitz is that Christo wants to argue the value of services which he is barred from doing under *Sterling* and *Jontow* instead of simply applying the agreed 2 and 1/2% to the actual Schaefer fee, properly computed. In the case at bar, under New York law the only necessary purposes of a hearing should be as to the value of Schaefer's settlement with EDS and perhaps only to the value of the property right it acquired (see Point 9), whether Schaefer is entitled to an equitable set off should it be determined it properly preserved that possible claim (see Point 9) or if Petitioner Nelipowitz elects gainst the contract as he is entitled to do under New York law.] But the Federal Courts below have dismissed Watson altogether and and purportedly leave Nelipowitz free to litigate against Christo in other fora *but without* *any of his statutory lien rights* (but see Point 11) when Christo is one of the persons who admits receipt of some of the proceeds (A-106, par. 42) that Attorney of Record Nelipowitz is entitled to follow. That decision is even more ludicrous here in a case that involves not only the question of the total attorney fee due from Schaefer under Pararaph 2. of the September 7, 1976 agreement (A-12) but also the fee subordination issues under *Beecher, (infra* Point 9) and EDS's breach of Nelipowitz's rights under *Fischer-Hansen, infra* Point 10.

Roskind simply does not support either of the principles enunciated in the Opinion below which judicially and without any proper substantiation modifies §475 to add, retroactively as to Nelipowitz who complied with the only and express statutory requirement, an appearance, a new requirements imposed solely by the Federal court,that direct retention is required and that an "of counsel" allegation is insufficient. As to the "of counsel" point it is now clear that the Second Department does not consider an "of counsel" relationship inadequate to enforce a lien and compensation agreement. See *Reilly v. Millcount Realty Corp.*, 419 N.Y.S.2d 644 (App. Div. 2d Dep't 1979) decided after Judge Motley's Opinion below and only recently reported. See also Points 7 *supra* and 8D *infra*.

The Opinion below, in words and effect erroneously equated a "retention" concept of its own making, that direct retention is purportedly required which was wrong to begin with (*Harwood, supra* at 540) with the simple, ordinary proposition that what the Attorney of Record must have, for a *statutory* lien, is express authority to appear (*Kelly* and *Mitchell, supra*. The Opinion did so contrary to New York law that permits indirect retention with authority (*Harwood* at 540) and contrary to the statute (§475) that expressly says "the attorney who appears... has a lien."

And we submit that when all the New York cases are understood, including the "no implied sub-retention authority" cases and the "trial counsel" cases so called, they all turn or rest upon one fundamental question of fact; i.e. whether the attorney, whatever his capacity, had (or could prove) the authority to perform the specific act in question subject only to the ordinary rule that a retained attorney has no implied authority to sub-retain other counsel. See Points 8A., 8B., and 8C.

For the foregoing reasons the Opinion's intepretation of *Roskind* is erroneous and contrary to both *Roskind* and *Harwood* which are consistent with each other and the New York rule that to impose liability on the client the attorney need not be directly retained but must act with the *authority* of the client.

8D. The Opinion misapplied the "Trial Counsel" rule, so called, and failed to squarely address any of the three distinct authority issues on which Nelipowitz's authority is clear.

The Opinion claims that the[New York] rule is that the trial counsel can only proceed against the attorney of record who retained him citing *In Re Loomis*, 273 N.Y. 76, 6 N.E.2d 103 (1937); *Grennan v. Well Built Sales of Richmond County, Inc.*, 35 Misc..2d 905, 231 N.Y.S.2d 625 (Sup. Ct. Nassau Co. 1962); and *Kiser v. Bailey*, 92 Misc.2d 435, 400 N.Y.S.2d 312 (Civ. Ct. City of N.Y. (1977).(A-7). If that so called rule had not been misapplied we would not need to take exception to that part of the Opinion. It is Nelipowitz who is the Attorney of Record (A-6; R-309, p.25) and Christo who finally admitted he was the trial counsel (A-95, par.1).

But the Opinion's further ill-founded and sophistic claims that its decision "is also consistent with the rule that trial counsel cannot recover from the client's proceeds ...." (A-7) requires that the misconceptions of the Federal Courts below be exposed. To get to the point quickly, only an Attorney of Record who appeared holds the lien *Weinstein, supra* and has standing to bring the statutory Petition. N.Y. Jud. L. §475; *In Re Ackerson,* 50 N.Y.S.2d 359 (Sup. Ct. Queens Co. 1944); *Friedland v. 601 West 149th et. Inc.,* 15 A.D.2d 742, 233 N.Y.S.2d 885 (1st Dep't 1962). However, "of counsel" attorneys clearly have numerous remedies available when they are not attorneys of record. *Harwood v. LaGrange,* 137 N.Y. 538, 32 N.E. 1000 3); *Citizens Bank of White Plains, New York v. Oglesby,* 270 App. Div. 136, 58 N.Y.S.2d 591 (2d Dep't 1945); *Application of Peters,* 271 App. Div. 518, 67 N.Y.S.2d 305 (3d Dep't 1946) aff'd 296 N.Y. 974, 73 N.E.2d 560 (1947); *Woodbury v. Andrew Jergens Co.,* 69 F.2d 49 (C.A. 2 1934); *Reilly v. Millcount Realty Corp.,* 419 N.Y.S.2d 644 (App. Div. 2d Dep't 1979). See also Point 7.

In *Roskind* as explained above there were three authority questions present that the Second Department did not fully discuss; authority to be sub-retained that was never in issue, and authority to appear and authority to conduct settlement negotiations; all controlled by Mr. Glazer's discharge date. The payment provision in the *Roskind* retainer agreement was never discussed. In this case there are three similar but different issues, retention authority clearly shown (A-12); authority to appear also clearly shown (A-35, par.6; A-34, par. 5; A-74, par.8-10, and A-46 to 49) and Schaefer's payment obligation to the "collectively referred to" "the attorney" (A-12).

The actual New York rule is that the right of any attorney, whether he be "of counsel", an Attorney of Record, trial counsel, or assistant attorney *depends on his authority to so act.* See *Kelly* and *Mitchell* discussed *supra* Point 8C., and *Rizzi, supra* (which refused to enforce a common law retaining lien because the client did not consent to the sub-retention) *Roskind, supra* (where the services of all three attorneys were to be considered only through the discharge date of Mr. Glazer); *Grennan v. Well Built Sales of Richmond County, Inc,* 35 Misc.2d 905, 231 N.Y.S.2d 625 (Nassau Co.1962) (holding no implied authority to hire trial counsel); *Beeber v. Empire Power Corp.*, 31 N.Y.S.2d 920 (N.Y. Co. 1941) (holding no implied authority to hire assistant counsel); *In Re Uris Estate, 61 N.Y.S.2d 423 (Surr. Ct. 1946) (in which the issue was conceded) and Mackler v. Richard Hyde Estate, Inc.*, 199 Misc. 837, 105 N.Y.S.2d 276 (1st Dep't 1951, (No implied authority). We would add a caveat. The "no implied sub-retention authority rule" has never been enunciated by the New York Court of Appeals and since it not relevant to this case our research was not exhaustive. However, we did find cases that indicate in certain circumstances, particularly as to geography or urgency, that a retained attorney might well have implied sub-retention authority as a part of his overall right and duty to manage a case, that the New York Court of Appeals might well follow in an appropriate case. Compare *Ward v. Craig*, 87 N.Y. 550 (1882). And *Harwood, supra*, was an express authority case. And the *Grennan* case does not even support the idea that there can be no implied authority in New York to sub-retain. See its actual words quoted *infra* Point 8D.

The "trial counsel" rule, so called, appears to have its genesis in *In Re Ackerson, supra* (which cites no authority for it) and in *In Re Loomis*, 273 N.Y. 76, 6 N.E.2d 103 (1937). *Loomis* did not involve any "of counsel" or *trial counsel" attorney and sets forth a "no indirect benefit concept, in the absence of agreement*" in a *non* retention case that is not in any way inconsistent with *Harwood*. Compare "It was not important . . . to show that the agreement was made directly . . . ." [where LaGrange] "was authorized by them to employ counsel". *Harwood* at 540. *Loomis* and *Harwood* are completely consistent; they both depend on the actual agreement and authority present. *Grennan, supra* is substantively consistent with *Loomis* and *Harwood* applying, in terminology, the "no indirect benefit" concept to a case where no sub-retention authority existed. "There is no indication . . . engagement was made at the request or instigation of the plaintiff or with his consent, express *or* *implied*". *Grennan* at 627. Except for the uninformative *Levy v. Jacobs*, 3 Misc.2d 994, 148 N.Y.S.2d 507 (lst Dep't 1955) involving a defendant's attorney [who absent proceeds or a counterclaim doesn't effectively have a charging lien anyways-Compare *Goldstein, Goldman, Kessler & Underberg v. 4000 East River Road*, 64 A.D.2d 484, 409 N.Y.S.2d 886 (4th Dep't 1978)]. The real question in all of the "trial counsel" cases, so called, was whether the attorney had or could prove that sub-retention authority existed. See *Grennan, supra (quotation); In Re Muscillo's Estate*, 159 N.Y.S.2d 253,255 (Surr. Ct. Westchester Co., 1957); *Kiser v. Bailey*, 92 Misc.2d 435, 400 N.Y.S.2d 312, 315 (Civ. Ct. City of N. Y. 1977). None of those lower New York court decisions seem to have considered both *Loomis* and *Harwood*, that *Loomis* and *Harwood* are completely consistent because they both depend on the actual agreement present, if any, or that the statutory petition is merely one of several procedures available in New York. *Harwood v. LaGrange*, 137 N.Y. 538, 32 N.E. 1000 (1893); *Citizen's Bank of White Plains, New York v. Oglesby*, 1945). *Ackerson*, entirely consistent with *Harwood*, fully enforced the retainer agreement which apparently contained a division of fee agreement where the Attorney of Record had in no way repudiated the rights of a forwarding attorney and if any one in the case at bar be the forwarding attorney it is certainly Christo, who along with Schaefer invited Nelipowitz to be the Attorney of Record (A-9, par. 19;A-35, par.6) which he did on Sept. 7, 1976 (A-111) and thereafter acting together at Settlement on May 26, 1978 almost two years later repudiated the Joint Retainer Agreement (A-21). Moreover, here even if it be assumed *arguendo* that Christo had the lien, he never properly asserted the lien and the equitable assignment has never been properly paid (See Point 9).

We submit that Nelipowitz, who is part of the "the Attorney" (A-12) *collectively* referrred to and the Attorney of Record, can still insist that the Joint Retainer Agreement (A-12) be fully enforced and that the rights of

Schaefer, Christo, Watson and Nelipowitz, be disposed of in one proceeding. Compare *Harwood* and *Roskind* especially and also *Application of Peters*, and *Woodbury*. As in *Ackerson* the Joint Retainer Agreement contains clear authority. The contract at issue says, among other things the "client[s] hereby agree to retain... attorneys... (hereinafter referred to *collectively* as *'the attorney'*...." and that Schaefer agrees to pay 'the attorney'. (A-12). Nelipowitz, not Christo was, and is the Attorney of Record. Only the Attorney of Record holds the lien, *Weinstein, supra*. And neither Schaefer nor Christo have ever claimed that Nelipowitz was not a part of "the attorney" (*collectively* referred to). Christo was the only lawyer in the Massachusetts Christo firm when this action was filed in the Southern District of New York by Nelipowitz. For the Federal Courts below to have held on the undisputed facts and Christo's own admisssion Nelipowitz was never an employee, or partner or associate of Christo (A-38, par.2; A-105, par. 39) that Nelipowitz was a part of that firm so as to purportedly endow it with the New York attorney's statutory lien Nelipowitz sought to "determine", and "to enforce" against Christo, Watson and Schaefer, and if necesary EDS, and to simultaneously hold that Nelipowitz who was clearly a part of the collective attorney under the very compensation agreement (A-12) that the statutory lien secured *Sargent v. McLeod*, 209 N.Y. 360, 103 N.E. 164 (1913) cannot enforce his lien and his share of that equitable assignment was, to say the least, anomalous.

For all the foregoing reasons set forth in SubPoints A through D of this Point 8 we submit that when all the New York cases are properly understood including the "trial counsel" cases, so called, they all turn or rest upon one fundamental question of fact; i.e. whether the attorney, whatever his capacity had, or could prove, his authority to perform the specific act or acts in question subject only to the ordinary rule that a retained attorney has no implied authority to sub-retain other counsel.

There are three distinct components to Nelipowitz's authority here. One goes to the existence of the statutory lien through authority to appear which he had express authority to do (A-35, par. 6; A-47, par. 9; A-74, par.8-10). The second authority question is retention and Nelipowitz was jointly retained (A-12) and in any event under New York law it is not important to show that the agreement was directly with Schaefer, only that it was made with Schaefer's authority. *Harwood, supra.* And the difference between retention and authority to appear was made clear in *Kelly* and *Mitchell.* And the third question is the payment authority and Schaefer clearly agreed to pay "the Attorney" as defined (A-12) and Nelipowitz is a part of that collective attorney.

And, for all the reasons set forth in Point 8 A, B, C, and D client liability to an attorney depends solely on the *authority* to do the act in question. In particular the Federal Courts failed to follow New York law as declared by statute and the New York Court of Appeals, including a holding that in express words is directly contrary to *Harwood* and thereby violates the Federal Conformity law.

POINT 9

The actual fee due to "the attorney" under the Joint Retainer Agreement was not $341,667 (as only out-of-state attorney Christo actually claims) but in the range of $1,198,800 to $ 2, 2530,000 and in no event lower than $775,000.000. In New York, in computing the attorney fee due in settlement the statutory lien and equitable assignments attach to the "proceeds", i.e., to the amount agreed upon in settlement, *when made.* New York law bars the subordination of attorney fees to set-offs, counterclaims or other separate

transactions betweeen the parties to the suit in the event of a statutory lien or an equitable assignment. The Opinion below failed to articulate and made two errors as to the primary facts at issue. The Opinion erroneously states “client has paid the attorney it retained” and failed to take Petitioner’s allegations as true. In-state client Schaefer never properly paid in-state Petitioner attorney Nelipowitz or out-of-state attorney Christo, who are “collectively referred to as “the attorney”. Schaefer was obliged to pay “the attorney” so defined. Page 1 of the Schaefer-Christo “Fee Adjustment Agreement” of May 26, 1978 (A-21) is a subterfuge. The real net amount Schaefer recovered to which Petitioner’s statutory lien, and the equitable assignment of the jointly retained attorneys attached upon settlement on May 26, 1978 is in the range of 3.6 to 7.6 million dollars, and is, in any event not less than 2.3 million dollars. The amount due Petitioner is in the range of $ 90,000 to $190.000 and in no event lower than $58,125.00. The courts below by failing to take Petitioner’s allegations as true thereby failed to properly consider the rule barring subordination of attorney liens and equitable assignments thereby also violating the Federal Conformity Law

The Opinion erroneously declares that “client has paid the attorney whom it retained”. The Opinion then erroneously assumes that only Christo was retained and ignores the mixed factual-legal issue of “who was retained” by the September 7, 1976 agreement and the circumstances leading up to it (A-74; A-46, par.46) that declares “the client[s] ... hereby agree to retain ...

attorneys . . . (hereinafter referred to collectively as 'the attorney')" (A-12). It is that *collective* "attorney" whom Schaefer was obliged to pay and which the Opinion ignores and which is not disclosed in the Opinion.*

The Federal Courts below further failed to note the events leading up to the Joint Retainer Agreement had similar authority from Schaefer. See A-34, par.5; A-35, par. 6. Compare A-12. See also Point 7, *supra.*

Most importantly the District Court implicitly and erroneously assumed or, without any evidentiary hearing, decided, that the real net amount (as defined on September 7, 1976) of Schaefer's recovery was known (and that the fee *thereon* was properly computed by applying Paragrah 2. of the Joint Retainer Agreement(A-12). And the value of said Schaefer recovery is the primary, and a pure issue of fact in this case and the whole purpose of why Nelipowitz petitioned pursuant to the statute (§475) for a *determination* of the fee. And the Opinion made that error notwithstanding Christo's own admission (A-106, par.42) that the fee was not so computed, because it was somehow computed by a method not yet known but in any event confirmed by the May 26, 1978 Agreement (A-21) which does not set forth the manner in or "method" by which the fee was computed.

In short Schaefer's true "settlement value" which was a pure fact question and the most important fact issue in this case or in any proceeding to Determine and Enforce a New York Statutory Attorney Lien (N.J. Jud. L §475) was never heard by the Court. The amount to be determined is the "amount agreed upon in settlement" *Fischer-Hansen v. Brooklyn Ht. R.R. Co.*, 173 N.Y. 492, 502, 66 N.E. 395 (1908) and same was not properly decided by the Courts below in any fashion.

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*The Opinion also fails to explain how the terms of an equitable assignment covering multiple assignees can be changed without the knowledge and consent of all the equitable assignees.

The Opinion, also by-passing several crucial Christo admissions, failed to take as true, or recognize the accuracy of Nelipowitz's allegations (A-32 to 44, especially Paragraphs 2, and 17 to 24), and erroneously accepted the allegations of Christo (A-83, par. 5; A-106, par. 42) and of Schaefer (A-85, par. 3; A-89, par. 3) and ignores Nelipowitz's allegations that "plaintiffs received a payment of 2.3 million dollars and other valuable consideration, which incuded a full release from a 1.3 million dollar debt owed by plaintiffs," (A-32, par. 2) and all the related allegations (A-39-43, par. 17-23). The fact issue here is not whether Christo was personally properly paid as the District Court declared he was. The primary fact issue in this whole case is: What was the real net amount (as defined) of the settlement to which Paragraph 2. of the Joint Retainer Agreement (A-12) was, and is to be applied? And that issue, and the underlying, and supporting fact questions were never reached by the Federal Courts below *in any manner.* And Petitioner's allegations must be taken as true. *Radovich v. National Football League*, 352 U.S. 445, 77 Sup. Ct. 390 (1957); *Gardner v. Toilet Goods Association*, 387 U.S. 167, 87 Sup. Ct. 1526 (1967); *Walker v. Hartford Realization Co.*, 74 F.2d 56 (C.A. 2 1934).

9A. Schaefer's real recovery was in the range of 3.6 to 7.6 million dollars and in no event less than 2.3 million dollars. The fee due to "the attorney" on the properly computed Settlement Amount was in the range of $ 1,198,000 to $2,530,000.

For the reasons that follow the net amount (as defined) that Schaefer recovered, i.e. the *proceeds* to which Nelipowitz's equitable assignment and statutory lien attached is approximately 3.6 million dollars to 7.6 million dollars and in no event less than 2.3 million dollars. Before discussing the "no subordination except in the excercise of equitable discretion" New York rule we shall set forth the facts as they appear in Petitioner's allegations (confirmed substantially in every respect by the existing Record) concerning the Schaefer, EDS and Christo transactions at issue.

Schaefer, among other things, engaged in four different 1.3 million dollar, more or less, transactions, i.e. a 1976 or earlier debt, a Spring 1977 payment, a 1978 debt-release, all with EDS, and one admitted 1978 set-off computation with Christo) entirely separate from the 1978 aquisition of a property right (A-18), which was also not counted in the computation of Schaefer's actual legal fee that became due on May 26, 1978. The Christo affidavit expressly acknowledges one 1.3 million dollar set-off of a separate transaction, but his affidavit does not admit the failure of Christo and Schaefer to count the other 1.3 million dollar transactions at all as required by New York law.

In attempting to keep track of the shells, the peas, the two peas that were actually under the shells, and the two peas that out-of-state attorney Christo and in-state client Schaefer completely removed from the table in computing the fee due to the "collectively referred to" "the attorney" (A-1), five primary transactions must be fully understood. They are: (1) Schaefer's 1976 1.3 million dollar "termination" or "cancellation" payment debt then due to EDS which was the subject of EDS's Second Counterclaim and which was released at settlement (A-17).* (2) The value of Schaefer's continued right to possess and use the EDS System ($4,000,000 development cost according to EDS-RT-pp. 88-89) which was the subject of EDS's other five Counterclaims (R-10)

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*As to Schaefer's 1976 debt to EDS, the fact, if any, that it might have had a defense to paying it is not relevant. See *Beecher; Reisman, Ozorowsi and LaFetra, supra*. As to Schaefer's loss of the right to use the EDS System the District Court held on March 28, 1977 that Schaefer was not entitled to possess the EDS system because it failed to meet two conditions, one of which was timely payment of the 1976 debt (R-305).

and, legally, newly acquired by Schaefer at the May 26,1978 settlement (A-18 section 7), (3) The Spring 1977 1.3 million dollar payment by Schaefer to EDS,** (4) The 2.3 million dollar cash payment by EDS to Schaefer at settlement (A-32, par. 2; A-106, par. 42) and (5) the Schaefer Settlement with EDS and all its proceeds; containing three components.

**As to the 1977 Schaefer payment transaction first note that Christo doesn't claim that the Court compelled Schaefer to pay that money to EDS (A-106, par. 41). The actual 1977 agreement is presumably in the possession of EDS and Schaefer. But the press releases are a sham. Compare first Schaefer's version "as a final termination payment claimed by EDS (A-19) with EDS's version which claimed only that it had been "previously paid ... at the direction of the Court" (A-20). Schaefer also claimed it "paid under court order" (A-19). Christo does not make such a claim. He claims, no doubt truthfully, that EDS kept the 1.3 million [paid in 1977] in exchange for the [May 26, 1978] Bond Release. See R-237 and A-106, par. 41. The Bond Christo refers to is apparently the $2,600,000 Replevin Bond running from EDS to Schaefer (R-67). And Schafer's and EDS "public" claims of a Court ordered payment of 1.3 million dollars to EDS are not true. The District Court did not compel Schaefer to do anything in 1977, "Schaefer will be enjoined from using the system *unless* ... it pays EDS ... the amount due it [in 1976], secured by a bond (R-305, p.12). The District Court did not compel Schaefer to pay EDS anything. And the Bond confirms that was a payment "pursuant to", not an order to pay but rather a condition to be complied with to obtain a stay of a judgment against Schaefer(R-67). Schaefer elected to pay it because it had to possess and use the system as a matter of business necessity (RT-617) "we wouldn't be able to operate"; RT-719 "disasterous") (if it didn't have it would have to discontinue business operations (A-42, par.21). EDS simply sprung the trap Schefer set for itself. See also Petitioner's allegation A-42, par.21. And EDS did not win its Third Replevin Counterclaim on March 27, 1977 either. "The Court will grant the motion for replevin and enter judgment... but same will be stayed on condition that Schaefer "Pay ... pending final disposition" (R-37). The real arrangement was that Schaefer's 1977 payment was for the use of the EDS system while the litigation was pending (A-40, par.19). No one compelled Schaefer to purchase a temporary right to use the system. The permanent right Schaefer acquired, at settlement, was a newly acquired property right (A-17, §7). And it was a valuable right. Schaefer thought it worth the price of well over a million dollars for one year's use (1977-78).

Schaefer's settlement proceeds actually included (i) said 2.3 million dollars in cash paid to Schaefer by EDS (A-32, par.2; A-106, par. 42; A-18, sec.6; A-19; A-20), (ii) EDS's release of Schaefer's 1.3 million dollar debt (A-32, par. 2; A-18, par.(b), (iii) Schaefer's acquisition of said newly acquired property right (A-33, par. 2; A-18) , or a total, depending upon the value of the property right, of 7.6 million dollars and in no event less than 3.6 million dollars***.

In computing the attorney fee, however, according to Christo, Schaefer counted only the 2.3 million in cash less a 1.3 million dollar set-off. The source of the 1.3 million dollar set-off, according to Christo's affidavit, is "1.3 million dollars previously paid to [EDS] by Schaefer" (A-106, par. 41) which is supported by the documents he produced (A-19,20). While the dates of that "source" transaction are not admitted it is clear from the Record that that transaction, *whatever the true terms were*, took place in the Spring 1977 (R-237, R-43) at least eight months after the Statutory Lien and Equitable

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***In this case the only possible good faith factual disputes on the part of Schaefer and Christo as to valuing Schaefer's settlement are the true terms and conditions of Schaefer's and EDS's Spring 1977 agreement which is not of Record and which Petitioner has not had an opportunity to either discover or litigate and we believe that the only good faith controversy among Nelipowitz, Christo and Schaefer directly, and EDS indirectly under *Fischer-Hansen, infra*, Point 10, is the value of the right Schaefer acquired pursuant to §7 of the Settlement Agreement. That is: What was the "continued right to use" worth? EDS valued it at $4,000,00.00. RT 88-89. By failing to pay the 1976 (or earlier) debt and failing to execute the required agreement Schaefer had lost the right to use the system. RT 172, *Id* 281-294, 395, 1007, 1200-1 which was reacquired only for the duration of the litigation A-40-41, par.19; R-308; R-37, R-238) and then acquired again (§7, A-18). The true terms of the Spring 1977 EDS-Schaefer agreement are at issue because they will also show, as Petitioner alleged, that the payment was for a property right limited to the duration of the litigation (A-40, par 19), and actually substantiated by the highly competent legal papers on the Record obviously designed to obfuscate what the real agreement was (R-67).

Assignments attached to Schaefer's cause of action on September 7, 1976. N.Y. Jud. L. §475; cases cited *infra*.

The fee computation thus included one Christo admitted set-off (A-32, par.2; A-106, par. 42; (cf. A-18, sec. 6; A-19, 20), and two items that were not counted at all in computing the fee due to the "attorneys" ("collectively referred to"— A-12). (The items that were either not properly counted or were misapplied in computing the fee were (A) the value of the property right acquired (A-33, par. 2; A-18, sec. 7) valued by EDS at $4,000,000.00, and (B) either the 1.3 million dollar debt release as to the 1976 debt (A-17, par. b; A-32, par. 2) or the 1.3 million Spring 1977 payment (A-40, par. 19; cf. R-237; R-305; R-37; A-18, sec. 6; A-19, 20) one of which had to be the direct or indirect source of the one set-off Christo admitted. (A-106, par. 42; A-19, 20)

Petitioner clearly alleged Schaefer's 1976 1.3 million dollar debt to EDS (A-38, par. 16; A-18, par. 18) and how it occurred (A-39, par. 17; A-18, par. 18) and that it was not truly a "termination" or "cancellation" payment (A-41, par. 20) but an obligation "which had previously become absolutely due together with interest thereon" (A-18, par. 18; cf. A-41, par. 20). The Record, created by Schaefer, clearly shows that the 1976 debt was not a termination or cancellation payment (RT— 980, 995, 1024) and actually consisted of previously deferred operating costs (RT-pp. 10, 12, 21, 91, 129-30, 198, 281, 331, 424-6, 428-30, 432, 434, 501-2, 514, 526-7, 557, 594-5, 603-4, 610, 695, 731, 733, 736, 978- 981, 986, 987, 989, 996, 1005, 1008, 1009, 1010, 1012-15, 1017-18, 1038, possibly deferred from even prior to 1973 or 1974 *Id* 129, 603, 610, 986, 997, 1013, 1015, 1133; (R-86, p.10) and which later became the subject of EDS's Second Counterclaim (cf. R-10) on November 9, 1976 also after Petitioner's Statutory Lien and Equitable Assignment had already attached on September 7, 1976. N.Y. Jud. L. 475; *Perry v. Chester*, 53 N.Y. 240 (1873); *Fischer- Hansen v. Brooklyn Hts. R.R. Co.*, 173 N.Y. 492, 66 N.E. 395 (1903); *Beecher v. Vogt Manufacturing Co.*, 227 N.Y. 468, 125 N.E. 831 (1920). The absence of Schaefer's right to continue to possess and use the system was the subject of EDS's five other Counterclaims (cf. R-10). R-10 is cited because EDS's Answer To Amended Complaint and Counterclaim is missing from the Record and from the District Court.

What Christo was in effect claiming by his Ruling Request No 5. (A-24) below, *inter alia*, (and what Schaefer must, on remission or otherwise, ultimately claim) is that said 1976 1.3 million dollar debt [regardless of its true nature as a termination payment or prior debt or deferred payment with interest to or loan from EDS] which was the subject of EDS's Second Counterclaim (cf. R-10) released at settlement by Section 3(b) of the Settlement Agreement [A-17, See par. (b)] could properly be set off against EDS's admitted 2.3 million dollar cash payment (A-106, par 42) in computing the "collective" Attorney's fee (A-12). They are *in effect* further arguing that the value of the property right Schaefer acquired at settlement, i.e. "Schaefer may continue to use the system" (A-18, par. 7) which system cost $4,000,000 to develop (A-33; RT— 88-89) when Schaefer's right to possess and use the system was the subject of EDS's other Counterclaims I, III-VI) (R-10) need not be counted as a part of the net amount Schaefer recovered pursuant to the September 7, 1976 Joint Retainer Agreement.

They are in effect further taking the position that neither the 1.3 million dollars Schaefer paid to EDS in the Spring of 1977 *in an entirely separate transaction* in the course of the litigation (A-40-41, par. 19) purportedly resulting from an Order on March 28, 1977 (A-19,20) in the course of the litigation (A-40-41, par 19; but see R- 305 and R-37 "pending ... final disposition" and actually paid to stay a judgment against Schaefer and the May 26, 1978 debt release [A-32, par. 2; A-17, par. (b)] either need not be counted at all as a part of, or may be set off against, the net amount(as defined) that Schaefer recovered pursuant to and notwithstanding Paragraph 2. of the fee agreement (A-12).

For proper analysis it is not immediately important whether the one Christo admitted set-off that Christo and Schaefer made related to the 1.3 million dollar 1976 debt or to the 1.3 million dollar Spring 1977 payment or the 1.3 million dollar debt release because the rule barring set-offs except in equity and only in the exercise of discretion, applies with equal force to debts released by the discharge of a Counterclaim and to any separate transaction entered into after the statutory and the equitable liens attached (on September 7, 1976). And all Six Counterclaims, and the debt release, and the Spring 1977 payment and the acquisition of the property right all occurred after September 7, 1976.

The New York statutory attorney lien may not be subordinated to such set-offs, counter-claims or separate transactions under New York law. *Beecher v. Vogt Manufacturing Co.*, 227 N.Y. 468,125 N.E. 831 (1920); *Newton Housing Authority v. Cumberland Construction Co.*, 358 N.E.2d 474 (Mass. App. 1977). An equitable assignment (*Harwood, supra*, see also Point 5) cannot be so subordinated under New York or Massachusetts law. *LaFetra v. Hudson Trust Co.*, 203 App. Div. 729, 197 N.Y.S.2d 332 (1st Dep't 1922) aff'd 236 N.Y. 533, 142 N.E. 272 (1922); *Reisman v. Independence Realty Corp.*, 195 Misc.260, 89 N.Y.S.2d 763 (1949) aff'd 227 App. Div. 1020, 100 N.Y.S.2d 407 (1st Dep't 1950); *Ozorowski v. Pawloski*, 207 Misc. 407, 139 N.Y.S.2d 31 (Mont. Co. Ct. 1955; *Delval v. Gagnon*, 213 Mass. 203, 99 N.E. 1095 (1912). At common-law the charging lien for costs did not arise until judgment. But even the common law retaining lien (which Nelipowitz never had an opportunity to exercise) clearly reaches proceeds *Harwood, supra*; *Ward v. Craig*, 87 N.Y. 550 (1882); *Robinson v. Rogers*, 237 N.Y. 467, 143 N.E. 647 mot. to dismiss app. den. 237 N.Y. 525, 143 N.E. 728 (1924). But under both applicable case law and N.Y. Jud. L. Section 475 the statutory and equitable liens are upon the client's cause of action, "which attaches to ... the proceeds ... in whosover's hands they may come, and those liens cannot be affected by any settlement between the parties before or after judgment..." *Beecher;* Reisman; LaFetra;, *supra*; *Perry v. Chester*, 53 N.Y. 240 (1873). And they "leap" on the settlement as soon as it is made. *Fischer-Hansen, infra* Point 10. See also *Delval v. Gagnon*, 213 Mas. 203, 99 N.E. 1095 (1912) and Newton Housing Authority v. Cumberland Constructonn Co., 358 N.E.2d 274 (Mass. App. 1977). What Schaefer has never done is properly assert its right, if any, under *Beecher*, "not of right, but in the exercise of discretion" for one *equitable set off; against the real* net amount (as defined) of its recovery in computing the attorney fee due to the *collectively referred to "the attorney" (A-12).*

Even if Attorney of Record Nelipowitz did not own the statutory lien (But see Points 4, 6, 7, 8, and 10) dismissal with prejudice as to client Schaefer is still prejudicial to Nelipowitz because it completely ignores the original division of fee agreement (A-33, Par. 4), Paragraph 2. of the Joint Retainer Agreement (A-12) and the Feb. 3, 1977 division of fee agreement (A-33, par. 7 and 8) confirmed by Christo's own February 7, 1977 letter (A-14) It also ignores the clear express *authority* from Schaefer which even if Nelipowitz were not jointly retained permitted Christo to choose "such other attorneys as he may choose to associate with him" all of which constitutes not only one source of Nelipowitz's authority to appear, independent of Schaefer's other express instructions to do so (A-34, Par. 5; A-74, Par. 8-10; A-46, par. 4-16), but also Nelipowitz's equitable assignment.

An agreement for a contingent fee is an equitable assignment. See Point 5 *supra.* See also that *Beecher, supra* at 472 expressly confirmed *Perry, supra.* Moreover when *Roskind, supra* Points 8B. and 8C. is considered, the actual judgment in *Roskind*, was to require immediate *quantum meruit* payment to Mr. Glazer for the work of he and his associates pursuant to Mr. Glazer's retaining lien because the equitable lien could not come into fruition because the client exercised his right to discharge the attorneys. The value of the retaining lien was to be measured by the value of the services of Mr. Glazer *and his associates.*

But this case involves both the security under New York law of the statutory charging lien which attaches to the cause of action and any settlement proceeds. (*See Sargent v. McCleod* and *Fischer-Hansen, infra,* Point 10 at p. 96) and and an equitable assignment which did come into fruition, neither of which may be subordinated. *Beecher* and *Perry* and other cases cited supra. Even if the Christo firm had the lien, the fee payable to "the attorney" was never properly computed pursuant to the Joint Retainer Agreement (A-12). Further, Christo's admits at least a 2.3 million dollar Schaefer recovery were true and admits at least one 1.3 million dollar set-off was made (*Id*). He even produced the yet unauthenticated (by Schaefer and Nelipowitz) Settlement Agreement which demonstrates same. (A-17-20).

9B. For the reasons previously and hereinafter set forth "[T]he [A]ttorney's" fee due was in the range of $1,198,000 to $2,530,000 and in no event less than $775,000. The May 26, 1978 "amendment" is a subterfuge and covers up the real net amount (as defined) that Schaefer recovered.

For the reasons previously and hereinafter set forth "the attorney's" fee due was in the range of $1,198,000 to $2,530,000 and in no event less than $775,000. The May 26, 1978 "amendment" is a subterfuge and covers up the real net amount (as defined) that Schaefer recovered.

Christo did not claim the collectively referred to "the attorney" (A-12) was properly paid. He claimed only that "I agreed on *my* compensation" ... The amount agreed upon ... has been paid in full" (A-83, par.5); and that "my fee was $341,667 less a credit of $55,000 previously paid to "me" (A-106, par.42). On its face and without more that is an absurd claim that the "other equitable assignee pro tanto attorneys as he may choose to associate with him" were paid nothing. But the Joint Retainer Agreement (A-12, par.2) provides that the client agrees to pay "the attorney" which is defined as "attorneys ... referred to collectively". That is an agreement that Schaefer will pay "the attorney"; not that Christo will pay. Even Christo acknowledged that much in the Court of Appeals below where he said, at p. 16 of his brief there, "The fee provisions of the agreement [referring to A-12) provide for payment to 'the attorney', defined in the agreement...." The fact that Christo had a right to choose which attorneys Schaefer would pay pursuant to the Joint Retainer Agreement* as he correctly claims is not at issue here.

And Schaefer's duty to make that payment arose on May 26, 1978 when, according to Christo, Schaefer received the net amount as defined in that same Paragraph 2.; whatever it is. The fact that Schaefer made a prior personal advance to Christo of $55,000 (A-106, par.42) is irrelevant. The letter agreement of May 26, 1978 (A-21) is an attempted amendment by Schaefer, and Christo (who legally was one of several equitable assignees pro tanto) acting together in disregard of the rights of at least one of the other equitable assignee "other attorneys ... referred to collectively" in the Joint Retainer Agreement (A-12) to amend the net amount due under Paragraph 2. thereof and converting it, *not into a new method of computing it* as Mr. Vumbacco alleged, under oath [A-89, par. 3 - Compare A-21], but into a mere statement of what Schaefer would [did] pay Christo. Except for the obvious subterfuge of avoiding proper accounting for the net amount Schaefer actually received on Schaefer's books and records we do not know with specificity or certainty what other purposes, if any, lie beneath the subterfuge.

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*The fee to Schaefer was to be 40%, not 33 1/3% if the Joint Retainer Agreement had to cover the expense of obtaining other local counsel (A-33, par 3; See also A-46, par. 3, 4, and 5). And Schaefer got a bargain; 6 2/3% is almost three times the minimal amount due Nelipowitz (A-35, par. 7 and 8; A-14).

But let there be no doubt that a subterfuge is present. In the first instance, and even considering the $55,000 advance to Christo before the contingent fee was earned (A-102, par. 42), if a subterfuge was not intended and the real net amount Schaefer recovered was only $ 1,025,000 as Christo claims (A-102, par. 42) then an amendment was not necessary. Even if it be conceded *arguendo* Christo was the sole retained attorney, all Schaefer needed to do was pay the admitted $341,667 less the $55,000 advance. There was simply no reason to "delete" (A-21) the original Paragraph 2. (A-12) if the real net amount was only $1,025,000. And when the "Defense Fee" provision is read in connection with Christo's own affidavits there could not have been a need to amend Paragraph 1. either. Christo admits, albeit unintentionally, that the "defense fee" payments were payable long before May, 26,1978. The first $ 40,000 was payable on September 7, 1976 (A-12). The next $30,000 installment was payable by at least February 1977 (A-12; A-105, par. 39). And because there never was a trial the last $30,000 installment (A-12) never became due. And it would be ludicrous to infer Schaefer advanced Christo $55,000 against an unearned fee without having first paid the $30,000 installment (so due in February 1977). And a claim that the "expense and disbursement" Paragraph 3. required amendment when the litigation was over would, to say the least, lack credibility. In short, all of page 1 of the May 26, 1978 was, and is, a subterfuge to cover up the real net amount Schaefer recovered that was never necessary unless a subterfuge was intended.

And the amounts Schaefer recovered are known not only from Nelipowitz's allegations (A-32, par. 2;— See also P. 80 *supra*) but demonstrated on the Record Schaefer and EDS created. Schaefer received 2.3 million dollars in cash acording to Christo (A-106, par. 42;) and it was publicly announced in the Wall Street Journal (A-37, par. 14) [on May 30, 1978 at page 16] and is shown in

EDS's and Schaefer's approved press releases (A-18-20). Although not admitted numerically in the Settlement Agreement Schaefer received a 1.3 million dollar debt release (A-17, par. (b)) and the amount is fully documented in the Record (See p. 81 *supra*). And Schaefer received a property right as alleged (A-33, par.2) (i.e. Schaefer may continue to use the system (A-18, §7) valued at $4,000.000 by EDS (RT-88-89). The first two components simply can't be refuted by any one. Schaefer and Christo of course have not yet admitted the value of the property right. But, for those reasons, Schaefer's real recovery was in the range of 3.6 to 7.6 million dollars.

And the total fee due to "the attorney" (A-12) thereon, at 33 1/3% (A-12) was in the range of $1,198,000 to $2,530,000. Why Christo accepted less remains a mystery to be sorted out. In any event the properly computed fee due to the "collectively referred to" "the attorney" could never have been lower than 1/3 of the $2,325,000 cash amount Schaefer received, or $775,000. This is so because even if the property right Schaefer acquired on May 26, 1978 (A-17) was without value and the further assuming *arguendo* Schaefer might have been entitled to *one* equitable set off, either the 1.3 million dollar debt release of May, 26 1978 or the Spring 1977 1.3 million dollar payment from a separate transaction was set-off against the cash amount Schaer received. And set-offs from separate transactions or from matters that are the subjects of Counterclaims [the 1976 debt and the property right were the subjects of separate Counterclaims] (A-17) may not be counted in determining the fee due to an attorney under either a statutory lien or an equitable assignment under New York or Massachusetts Law. (See cases cited, *supra* at p. 83.)

And for the same reasons, at 2 1/2% of Schaefer's recovery (A-35, par. 7 & 8; A-14), the minimum amount due Nelipowitz, from the real net amount Schaefer received is in the range of $90,000 to $190,000.00 and is in no event less than $58,125. And Nelipowitz has received nothing.

And Federal Courts are obliged to apply state law as declared by its highest Court pursuant to the Federal Conformity Law (28 U.S.C.A. 1652). The Federal Courts below not only violated Nelipowitz's "equal protection" rights (See *Erie Railrod Co.* and *Guaranty Trust supra* Point 3) but also violated his rights to due process by failing to take his allegations, even standing alone and without the benefit of the Record citations we have noted herein and without any discovery as to key issues of fact as true, as they are required to do. See *Radovich, Gardner Trust, and Walker, supra* (Point 2) and further entirely ignored Schaefer's payment obligation to "the attorney" (A-12).

In any event Schaefer has breached its equitable assignment obligation to Nelipowitz who has receieved nothing pursuant to Paragraph 2. of that Joint Retainer Agreement (A-12). Schaefer's obligation to pay did not run to Christo alone. It ran to "the attorney" "collectively referred to".

Prior to Schaefer's court ordered Response To Petition (A-92-93), its internal general counsel claimed in a September 22, 1978 affidavit filed with Christo's response to Nelipowitz's Petition in the District Court that "Schaefer [did not] have any knowledge of any agreement betwen Christo and Nelipowitz." (A-85, par. 3) Apart from the fact that claim is preposterous under the circumstances when the case arose (A-46 ff; A -74) and may well have led to Judge Motley's erroneous Opinion, Schaefer did not raise that factual and legal claim in its January 2,1979 formal Response to the Petition which had been ordered by the Court (A-92-93) and such claim would properly have to be against "the attorney" "collectively referred to" in the Joint Retainer Agreement (A-12) including Christo. See also Point 8A. Such a claim legally would be a claim that Schaefer did not know about the division of fee agreements between Nelipowitz and Christo and between Christo and Watson (See also A-37, par. 13). If Schaefer had done so it would have obliged both Christo and Schaefer to have disclosed, based on Schaefer's and Christo's own contentions that only Christo was retained by Schaefer, to disclose exactly what he did tell Schaefer. See DR-2-107(A)* which requires disclosure of division of fee agreements which are expressly permitted by New York law. See N.Y. Jud. L § 491 and §474 and *Sterling* and *Jontow*. [See also Statement of Case, especially at Procedure]. That question by itself raises a host of questions surrounding the Joint Retainer Agreement and Nelipowitz's appearance that required at minimum an evidentiary hearing on issues Nelipowitz has never had an opportunity to litigate against Schaefer, or Mr. Watson. Nelipowitz also directly alleged that he had no reason to believe that Christo failed to comply with DR-2-107 (A). See A-77, par. 18. See also Schaefer's proper pleading obligations, discussed Point 8A.

By reason of those underlying errors the Federal Courts below also violated the Federal Conformity Law (28 U.S.C.A. 1652) which required them to properly apply *Perry* and *Beecher* which permits a set off "not of right but in the exercise of discretion" presuming further that a claim for a set-off is properly raised. No set-off claim right was asserted by Schaefer (A-92-93). And there are still other fact issues that have never been tried that would go to defending such a claim by Schaefer. (See A-34, par. 4; A-38, par.16; and A-39ff, par. 17 to 23, especially par. 20).

The Federal Courts below violated Petitioner's constitutional right to equal protection by failing to follow the Federal Conformity Law (28 U.S.C.A. 1652) and by making numerous erroneous findings of fact as set forth in the Opinion without ever giving Petitioner an evidentiary hearing or accepting his allegations as true (notwithstanding the Opinion's claim that it did the latter) or hearing Petitioner.

While provisions of the code do not constitute decisional or statutory law "the courts should not denigrate them by indifference".** ***Matter of Estate of Weinstock**, 40 N.Y.2d 1, 3 (Ct. App. 1976); Spilky v. Hirsch, 425 N.Y.S.2d 934, 935 (App. Div. 1st Dep't 1980). And the major issues at bar do not involve mere code violations but violations of S.D. Rules 3(c) and 4(c) by Schaefer's other attorneys. See pp. 43, 44 & 46-7** ***supra*****.**

POINT 10

Entirely apart from Schaefer, Christo and Watson, Nelipowitz has independent rights against Defendants EDS. Notwithstanding the form of the District Court opinion, EDS did not appear in the ancillary proceeding in either Court below. Defendants EDS were under a duty to protect Petitioner's Lien and are presumed to have retained sufficient to pay the amount due under Petitioner's Lien under New York law. Nelipowitz has New York statutory and other property and remedial rights that he was deprived of without a hearing by the Federal Courts below. The Federal Court Opinion is erroneous and prejudicial to Nelipowitz's numerous rights against EDS under and contrary to N.Y. Jud. L. §474 and 475, *Fischer-Hansen, Sargent V. McLeod* and *Robinson v. Rogers* because it judicially modifies the statute, retroactively, and is also squarely contrary to *Harwood's* rule that retention need not be direct and completely fails to follow and apply New York law as declared by New York statute and by the New York Court of Appeals and also thereby violated the Federal Conformity Law 28 U.S.C.A. 1652 and Nelipowitz's right to equal protection and due process under the Constitution, and was otherwise both prospectively and retroactively prejudicial to Nelipowitz's rights against EDS.

The Opinion's dismissal of defendants EDS *with* prejudice to Nelipowitz either coupled with, or independent of, its erroneous declaration that the in-state

New York attorney's statutory lien would run to the out-of-state Christo firm is prejudicial to in-state New York attorney Nelipowitz for the following reasons.

10A. EDS was properly named as a Respondent but never appeared but was nonetheless dismissed with prejudice as to Nelipowitz on a factual issue EDS could have but never raised.

Particularly because of the circumstances under which EDS was noticed as a Respondent below almost six months after the Petition to Determine and Enforce was filed, we have described the events leading up thereto in the Statement of the Case, Procedure.

Nelipowitz noticed EDS, for certain Pre-Hearing Rulings of Law (A-25-31) on February 27, 1979 for the following reasons. EDS was potentially liable to Nelipowitz under *Fischer-Hansen*, EDS clearly had knowledge and evidence of the value of the property right Schaefer acquired in the Settlement (A-18, Sec. 7) since they alone can market the system (A-17, A-18), because EDS is presumably in possession of true copies of certain documents such as the Original Summons and the Original Complaint and EDS's November 9, 1976 Answer To Amended Complaint and Counterclaims (all of which are missing from the District Court) and the real September 1977 Schaefer-EDS agreement that will presumably more clearly show what Schaefer's property right to use the system then really was. [He also intended it as a legal courtesy to EDS in light of *Roulstone v. Oesterreicher*, 188 Misc. 741, 66 N.Y.S.2d 244 Sup. Ct. N.Y. Co. 1946) (indicating that EDS would be bound by a lien value determination such as was petitioned for below if Christo or Schaefer could not pay the amount determined to be due Nelipowitz).] *Notwithstanding the form of the District Court opinion*, A-2, see especially Record Appendix. Ct. App., p .A-2)EDS *never appeared in* *the ancillary proceeding below* and claimed, by letters to both Courts, that they were not properly before either of them. A copy of its letter to the Court of Appeal has been lodged with this Court.

Notwithstanding even those claims of EDS the Courts below nonetheless still dismissed EDS *with prejudice* and relying on improper precedent ruled *inter alia*that Nelipowitz's statutory lien would run to the out-of-state Christo firm (See Points 6, 8, and 4 *supra*) on a factually disputed "retention" issue when in an action by an attorney against a defendant it is the defendant, in this case EDS who never even appeared in this case, who is obliged to plead and prove such an issue of fact*. See *Fischer-Hansen* at 502. The dismissal *with prejudice* against EDS is in essence a dismissal with prejudice on a fact that was never pleaded by EDS, and never tried. We think main action Defendants EDS were, properly named as Respondents in the ancillary proceeding below. See *Lawrence v. Commodore Nav. Corporation,* 27 F. Supp. 139 (D.C. S.D. N.Y. 1939) and *Freedman v. Kahn,* 172 N.Y. Supp. (App. Div. 1st Dep't 1918). And EDS raised no proper legal claim as to why they were allegedly not properly before the Courts below. They deliberately elected not to appear in the ancillary proceeding but were, nontheless, incredibly, dismissed *with prejudice* as to Nelipowitz.

We utterly fail to undertand how the District Court could dismiss Defendants *with prejudice* to Nelipowitz when Defendants never appeared in the ancillary proceeding and have continually claimed they were not properly before the Court. Dismissing Schaefer was bad enough. That was analagous to granting a default judgment to a *defendant* who had at least appeared. *But EDS did not appear.* And the Court of Appeals ambiguously affirmed "substantially".

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*The Court notwithstanding Schaefer's *non*-pleadings seems to have held Nelipowitz must claim direct retention contrary to *Harwood.* See also its irreconcilable errors *supra* Point 4.

10B. Dismissal with prejudice against EDS is contrary to two New York Judiciary Law Sections 474 and 475 and four leading N.Y. Court of Appeals cases and New York's "double protection" public policy against settlements made without the knowledge of the lien holders knowledge.

The Opinion is wholly inconsistent with *Sargent v. McLeod, supra,* and *Robinson v. Rogers, infra* and contrary to the rule that it secures the compensation because the Opinion below is inconsistent with and judicially modifies the express terms of Sec. 475, which says "an attorney who *appears* ... has a lien" and has the right to Petition to Determine and Enforce it. N.Y. Jud. L. Sec. 475.

The Opinion below incredibly declares in-state New York attorney Nelipowitz's lien would run to the out-of-state Christo law firm (A-6) which was always incapable of holding a New York lien because it was incapabable of appearing pursuant to Rule 3(c) of the Southern District or in New York and because it had no partner admitted in New York. For such a firm to appear in New York is squarely contrary to New York law and declared public policy. See *Rosenberg* dicussed in Point 6, *supra*. It did so by means of a Federal Court imposing new "direct retention" requirements, *retroactively,* contrary to New York Court of Appeals declared law (*Harwood, supra*) that requires only *authority* (See Points 8A. and 8B., *supra*).

And under *Fischer-Hansen* and N.Y. Jud. L. §475 EDS is liable to Nelipowitz. The fatal error [apart from its irreconcilable error (Point 4)] of the Opinion, both generally, and with respect to Defendants is shown by its failure to recognize, among other things, the difference between retention that *may and need only* arise from an *authorized* agreement *Harwood v. LaGrange, supra* (See Point 8A.), an express or implied attorney or counselor compensation contract which may not be restrained by Law (N.Y. Jud. L. §474) and the statutory lien that secures the compensation. §475. The lien springs from the statute, not the contract, and secures the compensation. *Sargent v. McLeod, supra*; *Robinson v. Rogers*, 237. N.Y. 467 472.

And that *with prejudice* dismissal against EDS coupled with a claim that the lien runs to the out-of-state Christo Firm (A-6) will not merely throw further litigation by Nelipowitz against EDS into utter chaos. It is further, and squarely, contrary to N.Y. Jud. L. §475 and *Sargent, Robinson, Harwood and Fischer-Hansen.*

Under New York law EDS's independent liability to Nelipowitz lies; entirely apart from the Schaefer-Nelipowitz, the Christo-Nelipowitz, and the Christo-Watson controversies. And we further point out that Nelipowitz's original affidavit in support of his Statutory Petition to Determine and Enforce his statutory attorney lien (A-34-42) which, even six months before EDS was noticed as to pre-hearing rulings for a hearing the District Court had already scheduled, wasn't even directed at EDS. Nonetheless it sets out facts showing EDS's liability. Those rudiments are the Schaefer EDS Settlement Agreement (A-32, par. 2 and see also A-39 through 43) made without Attorney of Record Nelipowitz's knowledge (A-32, par. 1; A-37 par.14) and the Stipulations of Dismissal and Bond Release (R237,8) which are not signed by Attorney of Record Nelipowitz (A-32, par. 1; A-43 par. 25) but which are signed by EDS's attorneys.

Simply stated a New York attorney who *appears* (N.Y. Jud. L. §475) in effect has "double protection" against settlements made without his knowledge because New York public policy interprets "proceeds" as including the Agreement to settle and that the lien that attaches to the client's cause of action at the time of appearance "leap[s] to ... the amount agreed upon in settlement". See *Fischer-Hansen* v. Brooklyn Hts. R.R.

Co., 173 N.Y. 492, 502, 66 N.E. 395 (1903) which decided exactly that four years after the current statute was enacted [in its present form except for the first sentence to the effect that attorney compensation agreements are unrestrained by law having been moved to N.Y. Jud. L. §474]. *Fischer-Hansen* is the grandaddy landmark New York statutory attorney lien case that rules supreme today. It discusses the statute's progress through the years. *Id at 498.*

Under New York law, as against the attorney, even an honest defendent who does not know the attorney's share of the fund (*Id* at 501) is "estopped from saying that with notice of the lien" (which notice arises from the statutory *apppearance*) that he "parted with the entire fund", ie. "the amount agreed upon in settlement." *Id at 502).*

> The statute is remedial in character, and hence should be construed liberally in aid of the object sought by the legislature, which was to furnish security to [New York] attorneys by giving them a lien on the subject of the action.*Id* at 499.

Ten years later the New York Court of Appeals spoke again in still another landmark case. *Sargent v. McLeod*, 209 N.Y. 360, 365, 103 N.E. 164 (1913):

> The lien [does] not spring from the [compensation] contract but from the statute.
>
> * * * *
>
> The defendant having knowledge of the lien may not say he disregarded it and parted with the entire fund. It was bound to retain and *the law conclusively assumes it has retained sufficient to pay the sum which the [attorney] was entitled to receive.* (emphasis supplied)

Accordingly, Defendants EDS were under a duty to protect Petitioner's Lien and are presumed to have retained sufficient to pay the amount due under Petitioner's Lien under New York law. The Federal Court Opinion below. is erroneous and prejudicial to Nelipowitz's rights against EDS under and contrary to N.Y. Jud. L. §§475 and 474; *Robinson v. Rogers, Fischer-Hansen, Sargent V. McLeod* and *Harwood* because it judicially modifies the Statute, and retroactively so as to Nelipowitz, contrary to its express purposes to secure the compensation of the New York attorney and the New York Court of Appeal's commands and rules of law that compensation agreements are not restrained by law, that retention *need not* be direct provided there is authority, and that the statutory lien secures the compensation and that the attorney lien statute is to be construed liberally for the benefit of the attorney who complies with the statutory requirement to hold it, *appearence.* The Opinion violates the Federal Conformity Law because it failed to apply New York law as so declared to the case at bar. See Point 3.

10C. By proceeding with a Statutory Petition Nelipowitz did not waive his other cumulative rights under New York law, e.g. *Citizen's Bank* and *Fischer-Hansen.*

The Opinion's unqualified *with prejudice* dismissal of EDS (and Schaefer and Watson) is also prejudial to Nelipowitz by apparently or arguably precluding Nelipowitz from, not only his New York statutory right to proceed in an ancillary proceeding against an out-of-state defendant, here EDS of Texas [and attorney Watson, who apparently resides in Massachusetts but practices law at a New Hampshire address] pursuant to the second sentence of N.Y. Jud.L. §475, which is a statutory property right, when New York law provides that the Statutory Petition is in addition to his many other cumulative remedies summarized in still another landmark New York case. See *Citizen's Bank of White Plains, New York v. Oglesby*, 270 App. Div. 136, 58 N.Y.S.2d 591, 594 (2d Dep't 1945) including the then "new" remedy. See *Fischer-Hansen* at p.498. A dismissal with prejudice is implicitly a holding that Nelipowitz has somehow waived his other rights contrary to New York law. A Statutory Petition is not a waiver. See *Botein, Hays, Sklar & Herzberg v. Polymetrics International Inc.*, 81 Misc.2d 398, 366 N.Y.S.2d 25 (Civ. Ct. City of N.Y. N.Y. Co. 1975). *A fortiorari* a statutory petition naming the out-of-state attorneys and a Court ordered Response by Plaintiffs and a Notice of Requested Pre-Hearing Rulings of Law as to a court ordered hearing can hardly be construed as a waiver of Petitioner's rights under New York Law against Defendants EDS.

10D. The Opinion both standing alone and coupled with the failures of the Courts below to compel production of true copies of key documents missing from the District Court further prejudices Nelipowitz's rights under New York law both placing him into a "Coughlin" situation, retroactively after he did what is required under N.Y. law to enforce the statutory lien, and then leaves him without remedy to obtain the missing documents necessary to show that EDS had knowledge of Nelipowitz's compensation rights.

Further prejudice to Petitioner is present because any Defendant who settles with knowledge of a Plaintiff's attorneys rights is liable to the attorney (*Fischer-Hansen*, at 501) and Nelipowitz has had no opportunity to ascertain EDS's knowledge of his rights beyond the constructive knowledge provided by N.Y. Jud. L. §475 by reason of Nelipowitz's appearance.

While *on the present incomplete record* it does not appear whether EDS had any other knowledge of

Nelipowitz's share of the Schaefer "proceeds", that is not relevant to EDS's liability pursuant to a statutory lien. *Sargent* and *Fischer-Hansen.* Moreover, a dismissal *with prejudice* cannot fairly assume as the Opinion and Judgments below seem to do, either that EDS did not know, or that knowledge of Nelipowitz's rights might be present even in the absence of Nelipowitz having been the Attorney of Record. In any event, because Nelipowitz is the acknowledged Attorney of Record (R-309, p. 25,6; A-4) Defendants were under a legal duty to ascertain the amount due Nelipowitz. See §475; *Fischer-Hansen* at 501 ;*Sargent supra.*

A Defendant's duty to ascertain the share of the fund the Attorney of Record is entitled to receive patently arises from the constructive notice the Defendants have of the Attorney of Record's appearance.*Id* The EDS Answer to Amended Complaint and Counterclaims, which would be the most preferable proof for obvious reasons, and other reasons that are not yet of Record, are missing from the District Court. But there is no doubt that EDS (and the other Respondents) knew Nelipowitz was Attorney of Record. Examination of all of EDS's pleadings which are of Record in the main action shows that EDS clearly made careful distinctions in their pleadings. Routine discovery papers were served on Christo but EDS took great care assuring that substantive and potentially dispositve Motion papers against Schaefer were served on Nelipowitz. (R-116, 165, second page of each Motion to Dismiss).

Most importantly some other pleadings that will clearly show that EDS knew Nelipowitz was the Attorney of Record are also inexplicably missing from the District Court. Specifically, we presume that Christo, Schaefer and EDS all possess copies of the Original Summons, the Complaint, and Defendant's Answer to the Amended Complaint and Counterclaims. *All* of them are missing. And to dismiss EDS with prejudice without first requiring them to produce the very documents needed to make the Record in the District Court itself *accurate and complete* (requested by Petitioner here on at least three Record occasions alone in both Courts below) on top of failing to take any action on the District Court Rule violations by Schaefer's other attorneys that caused this whole ancillary proceeeding (see Point 6 *infra*) and for neither the District Court nor the Court of Appeals to also do nothing about it is, we submit, such a *gross* abuse of Judicial discretion that this case requires the intervention of this Court on that ground alone and more so in light of the fact that the District Court's own Docket Sheet has been improperly altered (A-111) without any known proper authority.

The actual prejudice of the decision and refusal to make EDS a party and compel production of true copies of documents which properly belong in the Court is, as a practical matter, the apparent possible complete loss of an Attorney of Record's property rights under N.Y. Jud. L. §475. against not only Schaefer and Watson but also Christo (See Point 11) and EDS's separate liability to Nelipowitz under*Fischer-Hansen*, and *Sargent*. And as to EDS this is illustrated in this case because except for his copies of R-116 and R-165 Nelipowitz may or will have difficulty proving in a New York court that the EDS Texas Corporations knew of his rights and that result is flagrantly contrary to what §475 is intended to prevent. By failing to determine and enforce his lien, dismissing with prejudice and declaring Nelipowitz's lien would run to the Christo firm the Federal Courts below place Nelipowitz into a *Coughlin infra*, if not worse, situation even though he fully performed the very thing the statute requires, i.e. an *appearance* and he did so when it was impossible for the out-of-state Christo firm to appear. The most ridiculous part of the Opinion below is that it cannot supply an answer, in terms of New York law, explicitly how and when the Christo firm, so called, acquired the lien other than by its own decision almost three years after the appearance when the statute says the lien arises at the commencement of the action by appearance and New York law provides that the proceeding is not to establish the lien but to determine and enforce it. See *Sargent* at 362, *Fischer-Hansen* at 497, *Robinson v. Rogers* at 472 and *Application of Peters, supra.*

And the statute was amended precisely because of *Coughlin.* As explained in *Fischer Hansen, supra* at 497, the attorney lien statute was amended after and doubtless owing to *Coughlin v.N.Y.C. & H.R.R. Co.* 71 N.Y. 443 (1877).

Thus entirely apart from Schaefer, Christo and Watson, Nelipowitz has independent rights against Defendants EDS. EDS did not appear in the ancillary proceeding in either Court below. Defendants EDS were under a duty to protect Petitioner's Lien and are presumed to have retained sufficient to pay the amount due under Petitioner's Lien under New York Law. Nelipowitz has New York statutory and other property and remedial rights against EDS that he was deprived of without a hearing by the Federal Courts below. The Federal Court Opinion is erroneous and prejudicial to Nelipowitz's numerous rights against EDS under and contrary to N.Y. Jud. L. §§474 and 475, *Fischer-Hansen,* and *Sargent V. McLeod* and *Robinson V. Rogers* because it judicially modifies the statute, retroactively, and is also squarely contrary to *Harwood's* rule that retention need only be with *authority* and need not be direct and completely fails to follow and apply New York law as declared by New York's statutes and by the New York Court of Appeals and thereby also violated the Federal Conformity Law (28 U.S.C.A. 1652) and Nelipowitz's right to equal protection and due process under the Constitution, and was otherwise both retroactively and prospectively so prejudicial to Nelipowitz's rights against EDS.

POINT 11

The decision below is not a true dismissal without prejudice against Christo as purported (A-7).

On September 7, 1976 the Christo Law Firm so called, consisted only of Christo, and it had no New York partner and could not appear in any fashion. See *Rosenberg, discussed Point 6 supra and infra* at Point 13. And the statutory charging lien attaches to the cause of action on the appearance N.J. Jud. L. Sec. 475. The District Court fails to explain how a statutory charging lien which could only be held personally by Nelipowitz *Weinstein v. Siedmann*, 173 App. Div 219, 159 N.Y. Supp. 371 (1st Dep't 1916)(Only the Attorney of Record holds the lien in New York) could be held by the out-of-state Christo Law firm then or how it got transferred. And the answer is that it didn't and couldn't be so transferred under New York law. *Weinstein* is New York's landmark case and has been consistently followed in New York since 1916. Nelipowitz as Attorney Of Record was responsible to protect Christo's share of the proceeds. See *In Re Ackerson* and *Friedland, supra* at Point 8D.

The Opinion fails to recognize that the New York statutory lien law has not less than four components. One is the Statutory right to Petition itself; i.e. to Petition for a determination and to enforce And the statute secures the compensation. *Sargent v. McLeod, Robinson supra*

But the Opinion does not consider that the statute both secures agreements such as the Christo Nelipowitz agreement here (A-14)[the validity of which Christo has already challenged in the District Court (R-258) below] or may operate, as in the common law retaining lien cases to secure compensation either in accordance with the contract or quantum meruit when the agreement fails or if the attorney elects quantum meruit.*In Re Montgomery's Estate*, 272 N.Y. 323, 6 N.E.2d 40 (1936)

Bradbury v. Farber, 31 A.D. 2d 824, 298 N.Y.S. 2d 29 (2d Dep't.1969), *Reubenbaum v. B. & H. Express, Inc.* 6 A.D. 2d 47, 174 N.Y.S. 2d 287 (1st Dep't 1958), *Paolillo v. American Isbrantsen Lines Inc* 305 F.Supp 250 (D.C. S.D. N.Y. 1969); *Spinello v. Spinello* 70 Misc. 2d 521 334, N.Y.S. 2d 70 (Sup. Ct. Nassau Co 1972), and other cases cited *supra* Point 8C. fn. at p. 63 and Point 13 fn. at 113-4.

In point of New York law lien, determination and lien enforcement may occur in different courts. See *Roulstone v. Oesterreicher*, 198 Misc. 741. 66 N.Y.S. 3d 244 (Sup. Ct. N.Y. Co 1946). The special, but not only, valuable N.Y. property right of that lien is to follow "the [client's] proceeds into whatever hands they may come." N.Y. Jud. L. DA66475.

The Opinion, notwithstanding its clear intention that the dismissal against Christo be without prejudice as to Christo nonethelesss seemingly deprives Nelipowitz not only of his *immediate* compensation, which is the purpose of the §475 procedure, that was due on May 26, 1978. It erroneously declares, as a matter of law possibly binding on Christo and Nelipowitz in future litigation that Nelipowitz has *already lost*, without any hearing or trial.

The statutory "proceeds which are the EDS-Schaefer Settlement Agreement itself (*Fischer Hansen, supra*) to which the statutory lien "leaped" after the lien attached to Schaefer's cause of action on September 7, 1976 and Nelipowitz *then* acquired the right to follow the proceeds on September 7 1976 (Sec. 475) , when the Christo law firm consisted of one Massachusetts attorney, which proceeds may be followed into "whatever hands they may come" including both Christo's hands *and the hands of anyone he transfered them to such as Mr. Watson.* Christo even acknowledges receipt of some of them (A-16, par. 42). Nelipowitz also claims that Christo, notwithstanding Christo's contrary claim , did not receive the proper and full amount due to the collective attorney because of the improper Schaefer Christo subordination. See Point 9, supra.

We further note, in light of the apparently contemporaneous Schaefer — EDS and Schaefer — Christoay 26, 1978 agreements that New York public policy bars attorneys from standing in the way of the Settlement, as noted in *Fischer-Hansen, supra.* Neither Christo nor Nelipowitz could have violated that standard, which was expressly included in the September 7, 1976 Joint Retainer Agreement (A-13), without breaching both the contract and New York public policy. That still doesn't answer why Christo subordinated the "collective attorney" fee due on the day it was fully earned or why Schaefer requested such a subordination.See Point 9 *supra.*

And the reason for Judge Motley's confusion is the same as was pointed out, for other reasons at Point 8B. Judge Motley and the Second Circuit failed to distinguish indirect retention permitted under N.Y. law provided there is express authority *Harwood v. LaGrange*, 137 N.Y. 538, 540 N.E. 1100 (1893), and which Christo himself claims and must claim that he had, from the express or implied compensation agreements of attorneys or counsellors permitted by, and which are not restrained by law by, §474 and §491, and the statutory lien that arises on the *appearance* (§475) which secures the compensation in whatever form it be decided. *Sargent v. McLeod,,* 209 N.Y.360, 365, 103 N.E. 164 (1913).

By failing to follow those New York laws as declared in its statutes and by the New York Court of Appeals the Federal Courts not only violated the Federal Conformity Law.28 U.S.C.A. 1652 . They also deprived Nelipowitz of his valuable statutory rights to *secured compensation*, to follow the proceeds and to bring a summary equitable proceeding for relief, without any trial or hearing, or opportunity to plead over if the Affidavit supporting the Petition were truly insufficient, or to prove he was directly retained if such were necessary when the Joint Retainer Agreement both expressly shows joint retention and was produced by Christo but not yet been authenticated by Schaefer, when Nelipowitz , after Christo's and Vumbacco's descriptions of it in September 1978 immediately said "If [the agreement Christo and Vumbacco referred to exists] it is apparently inconsistent with the agreements and instructions among Christo, Petitioner, Lear, Oatley, Heutchy, and Taylor." (A-66) and thereafter said I wish to reserve my rights to seek reformation" (A78, first line).

For all the foregoing reasons all those statutory rights, while similar to, are not the same as, and are in addition to a common law action at law for services either quantum meruit or on an express or implied contract and the Opinion's claim that its decision is without prejudice as to Christo is gross error without merit.

POINT 12

The Opinion did not, as it purports to do, take Petitioner's allegations as true and thereby failed to grant Petitioner "due process".

The Opinion purports to have taken Nelipowitz's allegations as true.(A-3).

In the preceding Points of this Brief, especially Points 4, 5, 6, 7, 8A., 8B., and 9 are detailed comments and comparisons with precise citations to Petitioner's actual allegations, Christo's admissions contained either in his own affidavit or the Schaefer related documents he produced or to the Record created by Christo, Schaefer and EDS in the main action on the Opinion's most important misstatements of fact set forth in direct context with the legal issues to which they relate. However, the problems of the District Court Opinion's failure to take Nelipowitz's allegations as true are sweeping, pervasive and plainly incredible. All of the Opinion's significant statements of fact are wrong to begin with, not only in truth, but on Petitioner's allegations, and contrary to much of which was admitted, at least by Christo. Nelipowitz's allegations are shown to be true either in documents Christo placed on, or are otherwise in, the Record. All of the Opinion's misstatements of fact track to and show an almost total acceptance not of Petitioner Nelipowitz's pleadings but of Respondents' pleadings. See, in addition, to the aforementioned citations to the pleadings and Record, the Comparison of Opinion, Petitioner's Allegations, Respondent's Allegations and the Record.(A-128-135).

For Petitioner's actual allegations see A-32-44 and A-72-79 and A-55-57. See also Petitioner's Second Memorandum of Law (A-51-71a), written three months before Christo produced the contracts and four months before it became necesary to fully research all of the issues because of Christo's and Schaefer's stonewalling of Nelipowitz to prevent his obtaining proof of the true value of the settlement. In addition see the Taylor Affidavit (A-45ff.) that was obtained immediately after the Christo-Vumbacco-Watson attack on Nelipowitz containing numerous misleading statements of fact (A-81-87) (which were never rebutted in the Record because the District Court never held the hearings that were purportedly to be scheduled). See Docket Entry for December 20, 1978 (A-9). *The evidentiary hearings to be scheduled were never held.*

And the fundamental error of Judge Motley's feelings that Schaefer did not belong in the case expressed verbally at said "scheduling" hearing (R-309, p.22) never changed NOTWITHSTANDING NEW YORK LAW WHICH THE FEDERAL COURTS ARE BOUND TO FOLLOW. 28 U.S.C.A. 1652. And many of her errors are not immediately obvious. With all due respect to the District Court the Opinion was a cleverly worked Opinion including at least one patently deliberate fact omission to achieve a result; not a decision on the law of New York that that Court was bound to apply. The Opinion misstates the law only a little bit. The crucial errors are buried in misstated and assumed facts totally inconsistent with either Nelipowitz's allegations and Christo's admissions and logical reasoning itself.

The Vumbacco "method" *lie* concerning the true nature of the two major agreements at issue and both of which he apparantly witnessed [See the signature pages (A-13 & 23)] is squarely contradicted by the actual terms of the May 26, Agreements(A-21). Compare the actual agreement (A-89, par.3) with Vumbacco's claim the "new agreement ... set forth the method to be used in determining the amount which Schaefer would pay to Mr. Christo" which sets forth no method at all. And the most important fact issue in this case is that Schaefer and Christo they did not use the right "method". See Point 9., especially 9B. *supra* And much more than incidentally, and notwithtanding Christo's claim to the contrary, Petitioner is claiming that not even Christo was paid properly. While Christo apparently received some of Nelipowitz's statutory "proceeds", if his allegations as to the amount of money he actually received (A-106, par. 42) are true, and we think those monetary allegations are true, then Schaefer never paid a large portion of Nelipowitz's share of the statutory "procceds" to even Christo.

Were it not for the fact that neither Schaefer nor Christo have paid the amount due to him the funniest of all of Christo's claims in this case, which the Opinion implicitly and incredibly accepts (cf. A-6), and a claim in which Schaefer did not join Christo, is that he *subordinated* a fee (See *Beecher, supra* Point 9), the terms of which had been fully defined on September 7, 1976 (A-12, par.2) in the usual 33 1/3% terms, 21 months later on May 26, 1978 "on the same date that the settlement agreement was executed" (A-106, par.42) when the result was achieved and the fee pursuant to that agreement was then subsantially, or fully and actually, due and after "3,975 and 3/4 hours of work by he and Mr. Watson"(A-104, par.37) because "there were additional duties that [he] had to undertake" (A-106, par. 42). The question is why? And that is among the major reasons Nelipowitz filed his Petition in the Southern District of New York where the action occurred. and where Christo is accountable to Nelipowitz, the Attorney of Record who moved his admission *pro hac vice*. We are by no means certain that Schaefer did not somehow improperly coerce Christo into accepting less than was due to all the equitable assignees under the September 7, 1976 agreement (A-12), and especially so, among other issues not yet of Record, in light of the substantially contradictory Christo claims that $55,000 was purportedly "previously paid ... in monthly sums for maintenance of overhead" but was nonetheless thereafter, on Christo's own statement, clearly treated by Schaefer and Christo, (whatever the agreement at the time of the advance was) as a prior advance against the then unearned contingent fee. (See A-12, par. 2 and A-106, par. 42).

And for all of the reasons noted in this Point 12 and in the other "fact allegation issues" otherwise set forth in this Brief, the Federal Courts below violated one of the most elemental rules of law, thereby violating Nelipowitz's constitutional right to due process, by failing to take Nelipowitz's allegations as true as they were obliged to do. *Radovich v. National Football League*, 352 U.S. 445, 77 Sup. Ct 390 (1957); *Gardner v. Toilet Goods Ass'n*, 387 U. S. 167, 87 Sup. Ct. 1526; *Walker v. Hartford Realization Co. Inc..*, 74 F.2d 56 (1934).

POINT 13

For the reasons set forth this case raises an important public policy question on facts that could occur in any law suit in any Federal Court but which is, in any event, if only because of the volume of litigation, of importance in New York, the Second Circuit and especially in the Southern District of New York which requires that this Court review, and exercise its

supervisory powers over, the judicial policy of the Second Circuit as to the Question Presented in this Point.

A principal question for decision is whether Federal Courts, without contravening the Constitution, can in apparent effect transfer and preclude a New York attorney from enforcing, a *statutory* lien which rests on the *appearance* of the in-state New York attorney who appeared on behalf of the in-state client in the Federal District Court for the Southern District of New York, to an out-of-state Massachusetts law firm having one member who was not admitted to either the New York bar or to said Federal Court when the New York attorney was never a member, partner, associate, or otherwise a part "of the Massachsetts law firm and was merely "of counsel" *to* the Massachusetts law firm generally and associated *with* that firm, pursuant to a Joint Retainer Agreement that according to Respondent out-of-state attorney provides that the "client[s] hereby agree to retain ... attorneys (hereinafter referred to collectively as 'the attorney')...." contrary to the public policy of New York and in contravention of the Rules of said Federal Court that expressly provide "Only an attorney or proctor of this Court may enter appearances...." when the in-state New York client's claims in the main action rested exclusively on diversity jurisdiction as to *state* claims and involved *no federal* question, and do so by both claiming the New York statutory lien under local New York law "would run to the [out-of-state] law firm retained by the client and not to the associate *of* that firm" (A-6) and when, notwithstanding the Opinion below (*Id*), and on the Record here, both the out-of-state attorney and the in-state New York attorney agree that the in-state New York attorney was never a partner, member, associate or a part of the out-of- state one man law firm and by plainly refusing to address patent violations of the Rules of the Federal Court itself that should have, standing alone, protected the compensation due to the in-state attorney from the in-state New York client, and when said Rules were violated by the in-state client's other attorneys including the out-of-state attorney.

In the other points in our brief we have raised the problem of the Federal Courts below having violated the Federal Conformity Law (28 U.S.C. A 1652) and having thereby and otherwise violated Petitioner's Constitutional rights under the Fourteenth Amendment to the Constitution. In the case at bar the Schaefer clients were New York corporations which also had their principal offices in New York. They invited Christo, a Massachusetts lawyer who was not admitted in either New York or the Federal District Court for the Southern District of New York to prosecute Schaefer's claims which rested on *state* and not *federal* law and "authorized him to use the services of other such attorneys as he chose to associate with him" (A34, par. 5). Christo, in turn, invited Nelipowitz, a New York lawyer, admitted in New York, Massachusetts, and the Southern District and (who already had a general "of counsel" *to* relationship to the Christo Firm) to collaborate with him on the case and to "be the attorney of record" (A-33, par 4). Nelipowitz agreed to do so. On or about August 29, 1976 Schaefer "instructed" that Nelipowitz be the New York Attorney of Record (A-3, par. 6.) Nelipowitz appeared for Schaefer on September 7, 1976.

This case presents the opposite of the "collaborating attorney situs" situation that appeared in *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (1966) which, against the in-state New York client, protected the compensation rights of an out-of-state attorney who collaborated with New York attorneys in prosecuting the federal claims of that client theatre corporation. *Spanos* involved only an attorney client dispute and did not also involve a dispute among the collaborating attorneys. In *Spanos* the Second Circuit relied on the privileges and immunities clause holding "no state can prohibit a citizen with a *federal* claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice.(emphasis supplied) *Spanos at 170. Thus, under Spanos* we shall assume arguendo that Schaefer had the right to invite out-of-state attorney Christo to participate in the prosecution its *state* law claims, [and in fact multi-state law claims under New York and Texas law] subject however to any necessary collaboration with local counsel in the trial forum and subject to the Rules of the state and forum where the case occured. Indeed, Christo finally admitted below that he was "trial counsel of record"(A-95, par. 1). And we candidly acknowledge that Mr. Christo had a reputation as a successful litigator of computer related matters and that so far as Petitioner knows clients Schaefer of New York contacted Mr. Christo for that reason.

But *Spanos* was carefully, and most properly, limited to *that* situation "where a citizen has invited a duly licensed out-of-state lawyer to work in association with a local lawyer on a *federal* claim or defense". Spanos at 171. (emphasis supplied) Here, on the allegations, and on the facts of Record, after such an initial invitation from the client to the out-of-state lawyer both the out-of-state lawyer Christo and the in-state Schaefer "citizens" subsequently invited and directed that Nelipowitz, the in-state New York lawyer, be the New York Attorney of Record (A-74, par. 8 through 10; A-3-35, par. 6;A-33, par. 4; A-34, par. 5; A-46, par. 4-16; A-47, par.9; A-99, par.19). It is also undisputed by either Christo or Schaefer that the Joint Retainer Agreement provided that the "citizen" "client[s] hereby agree to retain ... attorneys ... (hereinafter referred to *collectively* as 'the attorney') ... in connection with any action arising out of [Schaefers'] ... relationships with [EDS]."

Except as discussed below we do not Petition here to challenge in any way the well considered *Spanos* case in which the "state situs" positions of the respective collaborating attorneys were the opposite of those at bar. But we do wish to emphasize that *Spanos* itself was a 6-1-2 in banc reversal resting solely on the presence of the clients *federal* claims and, as here, presented public policy issues as to the practice of law in Federal Courts by an out-of-state lawyer working in association with local counsel. The recent *Rosenberg* case dealt with those public policy issues in New York Courts.

The bottom line at issue in this case is whether Federal Courts may in effect sanction an express breach of a wholly contingent fee agreement covering all the in-state client's attorneys by the New York client and the out-of-state attorney to the detriment of the in-state New York attorney and in effect do so by a Federal Court actually both apparently extinguishing the in-state New York attorney's statutory lien under local law on a claim, contrary to New York law and public policy, that the lien runs to the out-of-state law firm, and by plainly refusing to address patent violations of the Rules of the Federal Court itself by the client's other attorneys that should have protected the in-state New York attorney's compensation rights.

The case underlying this ancillary proceeding case rested solely on diversity of citizenship between Schaefer and EDS and contained ordinary state claims of Schaefer for negligence, breach of contract and recission. The filed Complaint and Amended Complaint are missing from the Record and are among several important documents that Petitioner New York attorney Nelipowitz sought in both of the Federal Courts below and on several occasions, but unsuccesfully, to compel one or more of the Respondents to produce as a part of the Record. A copy of Petitioner's personal copy of the 23 page *Schaefer v. EDS* Amended Complaint (without the Exhibits thereto) has been lodged with this Court.

In *Spanos*, the Second Circuit strained itself, more or less, apparently and at least in part because the services were rendered in connection with the prosecution of the client's *federal* claim in the same Federal District Court where he sought to recover his fee (*Id* at 167), to uphold the compensation rights of an out-of-state attorney, who was not a member of the bar of the Southern District, who never sought to be admitted either regularly or *pro hac vice* and who apparently was never even in said Court (*Id at 169), whose original division of fee agreement was not in the Record (Id*at 163), and whose second *non-specific* contingent fee agreement apparently was not a true equitable assignment (See Point 5 *supra*).

But in the case at bar where the Record shows Nelipowitz, the in-state New York atorney (A-4) who, like Mr. Spanos, tried to enforce his rights in the very same Federal District Court for the Southern District of New York (in which both of the respective client's cases arose) and who, under both N.Y. Jud. L. §475 and the second sentence of the District Court's own Rule 3 (c) *appeared* (A-111) and who physically appeared in Court four times (A-111; R-1; A-32, par. l; A-101, par.29; A-83, par.4, A-95, par. 1 and R-16) and obtained two Orders (R-1 and 16),* and where Nelipowitz, the Attorney of Record (A-6; R-309,p.25) filed his Statutory Petition (N.Y. Jud. L. §475) (also citing his valid equitable assignment (See Point 5) which is fully documented in the Record (A-12; A-14; A-35, par.7 & 8)(Compare *Spanos at 163, col.1) in numerous places and sought reformation(A-77,8, par.23) of even that contract before he even saw it and because Christo's and Schaefer's descripion of it raised a question whether it expressed the true agreement (A-66) and it is Christo who is the out-of-state attorney (A-4) who was admitted pro hac vice* on Nelipowitz's *voluntary* motion (A-32, par.1; A-101, par. 29; A-83, par.4, A-95, par.1) which, pursuant to the Joint Retainer Agreement, Nelipowitz was apparently obliged to do in the Second Circuit (*Spanos* at 168) [and which he did do *volutarily under all the 1976* circumstances which are not yet a matter of Record because the District Court never held a hearing but including the then general and continuing "Of Counsel" relationship of trust and confidence between them, and in Christo's authority from Schaefer(A-34, par. 5) and receipt of instructions from Schaefer(A-35, par. 6; A-74, A-46 ff. par 4-16, 14, 16) which is of Record] the Courts below have rejected Nelipowitz's Petition *with prejudice* as to Schaefer, the client, and Defendants EDS(See Point 10) and Watson another of client's out-of-state attorneys who may or may not have received a part

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* Mr. Christo makes an issue of the large amount of work he and Mr. Watson did, as compared with Nelipowitz, including some 85 depositions (A-105, par.39). But "Much of a lawyer's work consists not in endless courtroom appearances or formal pre-trial procedures but in careful investigation of his case and he is entitled to be fairly compensated for his efforts in or out of court" *Paolillo v. American Export Ibrandtsen Lines, Inc.*, 305 F. Supp. 250, 252 (S.D.N.Y. 1969). Christo also made much below of the relative comparison of total hours between Nelipowitz, and Mr. Watson and Mr. Christo. What is not disclosed in the Record, because Judge Motley never granted a hearing, is the truth as to the relative amounts of time spent by Christo and Nelipowitz in preparing and commencing the earlier stages of the main action. Compare *Spinello v. Spinello,* 70 Misc.2d 521, 334 N.Y.S.2d 70 (Sup. Ct. Nassau Co. 1972)--"It would be manifestly unfair to exclude from the attorney's lien the preliminary legal work necessarily entailed in the bringing of the proceeding". The statute is to be construed liberally. *Fischer-Hansen,supra* p. 96. Here, Nelipowitz seeks to enforce his mere 2 1/2% agreement (A-12, A-35,par. 7 & 8; A-14). And under New York law compensation agreements of attorneys or counselorsare unrestrained by law (N.Y. Jud. L. Sec. 474) and it is proper to demand larger compesation when the fee is not certain but contingent on success. *Murray v. Waring Hat Mfg. Co.*, 142 App. Div. 514, 127 N.Y. Supp. 78 (2d Dep't 1911); *Friedman v. Mindlin*, 91 Misc. 473, 155 N.Y. Supp. 295 (City Ct. of N.Y.1915);

(Footnote from prior page continued)

Morehouse v. Brooklyn Hts. R.R.Co., 123App. Div. 680, 108 N.Y. Supp. 152 (2d Dep't 1908) aff'd 195 N.Y. 537, 88 N.E. 1126 (1909).And Christo even admits that Nelipowitz did 3.9% of *all* the legal work on the case.A-105, par. 37). (Translated from the agreements, Nelipowitz is entitled to 2 1/2% of Schaefer's recovery or 7.5% of the 33 1/3% contingent fee). Christo and Schaefer are bound by their agreements as a matter of law. See Point 3 *supra*. And as for Christo's "personal" remarks he is barred from asserting them by New York law and may not insist, as he attempted to do (A-24, par. 2), that Nelipowitz's services be evaluated quantum meruit. *Jontow v.Presant,* 34 A.D.2d 744, 310 N.Y.S.2d 145 (1st Dep't 1970); *Sterling v. Miller,* 2 A.D.2d 900, 157 N.Y.S.2d 145 (2d Dep't 1956) aff'd 3 N.Y.2d 778, 164 N.Y.S.2d 32, 143 N.E.2d 789 (1957).

of the proceeds or otherwise interfered with Nelipowitz's rights when the New York statute permits Nelipowitz to follow the "proceeds ... in whatever hands they may come" (N. Y. Jud. L. § 475) and when even if Nelipowitz were not the statutory lienor and were only an equitable assignee even his purely equitable rights still both attached on September 7, 1976 and may not be subordinated (*Id; Perry v. Chester*, 53 N.Y. 240 (1873); *Beecher v. Vogt Manufacturing Co.*, 227 N.Y. 468, 125 N.E.831 (1920); *Fischer-Hansen v. Bklyn. Hts. R.R. Co*, 173 N.Y. 492, 66 N.E. 395 (1903).

And Federal Courts are bound to apply New York law pursuant to the Federal Conformity Law (28 U.S.C.A. 1652).

The actual and only partially disclosed actual legal effect of the Opinion in this case is to logically extend the *Spanos* rationale beyond its own stated limits (as above), and without any federal justification, so far as to deprive the in-state New York Attorney of Record of his statutory lien and to theoretically transfer it to the out-of-state lawyer who according to both New York law, as declared in a decision rendered after the District Court opinion below, and the Rules of the Southern District itself could not appear in the action. *Rosenberg v. Johns-Manville Sales Corporation*, 416 N.Y.S.2d 708 (Sup. Ct. N.Y. Co. Spec. Term Part 1 1979); S.D. Rule 3(c), second sentence. See Point 6 *supra*.

Christo, on his own statement of the work he performed (A-101, par. 28; A-104, par.37, A-105,pr.39) absent Nelipowitz's Motion to admit him *pro hac vice* in the main action would clearly have been illegally practicing law in New York. N.Y. Jud. L. Sec. 478; *Spivak v. Sachs*, 16 N.Y.2D 163,263 N.Y.2D 953,211 N.E.2D 329 (1965) rev'g 21 A.D.2D 348, 250 N.Y.S.2D 666 (1 Dep't 1964); *Spanos* at 164. The issue here is not whether, as in *Spanos*, the Federal Courts might find some federal ground to excuse a failure to even apply for admission in any manner. Nelipowitz himself moved Christo's *pro hac* *vice* admission to the Southern District. The issue is to identify the source of the power of the Federal Courts to theoretically transfer the statutory lien local law *property rights*, and without any hearing on the facts, of the in-state New York attorney who did appear to the out-of-state lawyer who could not appear and who, absent in-state attorney Nelipowitz's Motion, would have been illegally practicing law in New York. We think that Federal Courts do not have the power to do that and that there is no legal precedent or sustantial federal need or power or justification for it.

We have no disagreement with the *Spanos* result or any direct substantive disagreement with the *Spanos* rationale which provided a federal justification for the Second Circuit to apparently depart from the law of New York to achieve a just result. But the Second Circuit, without stretching New York precedent very far, or at all, could also have protected Mr. Spanos' rights and permitted Mr. Spanos to recover under *Harwood v. LaGrange*, 137 N.Y. 538, 32 N.E.1000 (1893) and *Woodbury v. Andrew Jergens Co.*, 69 F.2d 49 (C.A. 2 1934),[except for the theoretical, but in context inequitable, possibility that Mr. Spanos's second "non-specific" agreement, *Spanos*at 163, second column, may not have been a true equitable assignment and which the Second Circuit in any event disregarded] on the ground of the clear "authority" (the basic New York Rule See Point 8) he had from his client and the client's other attorneys. (See also both *Spinnello* and *Padillo* f.n. this Point *supra*.

Even if Mr. Spanos did not have a true equitable assignment there is certainly enough other precedent in New York law to have permitted Mr. Spanos to have recovered. Fairly viewed, *Spanos* must, and in any event can be, regarded as a decision by a Federal Court determined to expand its powers and rid itself of state law *limitations* that it either disagrees with or does not wish to apply. The *Spivak* case alone provided room. If the Second Circuit had not chosen to do that in *Spanos*, it could have easily avoided the "illegal practice of law" argument raised by the client theatre corporation, which like client Schaefer here tried to avoid paying the attorney fee properly due. If that cursory analysis be correct, and we think it is, then there was no need for the Second Circuit to find federal policy justification even in *Spanos*. And if that be true we were squarely facing Federal Courts below that were determined to apply a *Swift v. Tyson* judicial mentality to the New York Statutory Attorney Lien Law as they saw fit and regardless of what New York law is, and regardless of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938) 98 F.2d 49 Pet. for Cert. den. 305 U.S. 637, 83 L. Ed. 410 Rehear. Den. 305 U.S. 673, 59 Sup. Ct. 229, 83 L. Ed. 436. *We submit that that is exactly what has happened in this case.* And entirely apart from all the fully documented express, and obvious, violations of the Federal Conformity Law by the District Court and the Second Circuit this Court should exercise its supervisory power now; both to prevent more departures from state law, including New York law, by the Second Circuit and to protect this Petitioner's rights.

We pointed out below that the Opinion lacked uniformity with *Walker v. Hartford Realization Co., Inc* 74 F.2d 56 (C.A. 2 1934) and *Woodbury v. Andrew Jergens Co.*,69 F.2d 49 (C.A. 2 1934) even though same was not publicly notable because the key "collective attorney" and "payment" clauses were not publicly disclosed in the Opinion. See Point 5. But here, while the Opinion's inconsistency and we think the effective unconstitutional extension of *Spanos* as to transferring a local lawyer's lien under local law might well be obscure if they are not read together and in light of the Federal Conformity Law and *Erie*, inconsistencies exist and contstitute dangerous precedent unless corrected now by this Court. The sweeping implicit extension of *Spanos* and of Federal Court power that now appears to be unlimited by local attorney lien law property right provisions is at least partially public, albeit unintentionally. See the Opinion below which declares Christo is the out-of-state attorney and that Nelipowitz is the Attorney of Record (A4,6) and which then claims the Christo law firm holds the New York statutory lien (A-6) That holding is clearly in error. See Points 1,3, 4, and 6, 8, 9, 10, 11 and 12 herein and *Rosenberg v. Johns-Manville Sales Corporation*, 416 N.Y.S.2d 708 (Sup. Ct. N.Y. Co. Spec. Term Part 1 1979). And we further submit that the Federal Courts below have already violated the law and that the Opinion below standing together with *Spanos*, supply dangerous precedents for future abuses of a local lawyers rights merely because he collaborates with an out-of-state lawyer and moves his *pro hac vice* admission. And this is especially so if Federal Courts may not only misdeclare local law but are also free to ignore violations of the Federal Court's own appearance and stipulation Rules such as has occured below.

CONCLUSION

For the foregoing reasons the Federal Courts below failed in numerous respects to take Petitioner Nelipowitz's allegations as true and failed to comply with the Federal Conformity law in numerous respects and thereby violated Petitioner's constitutional rights to due process and equal protection, and this Court should therefor grant *certiorari* and thereafter compel the Courts below to comply with the Federal Conformity law

Respectfully submitted,

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ERRATA

(to Petition for Certiorari-In the Matter of Thomas R. Nelipowitz)

A copy of the Bond that is referred to in subject Petition is lodged with the Court. We were unable to travel to New York City to clarify its Index No. in the Record on Appeal which may be either R-43 or R-67 and which is referred to under both numbers at pages 79 and 80 of the Petition.

Respondents Schaefer and EDS entered two (2) Stipulations at issue here. One was the Stipulation of Dismissal (R-237). The other was a Stipulation of Bond Release (R-238). Our citations to them were erroneously transposed throughout the Petition. A copy of each Stipulation is lodged with this Court.

On page 79 "(R-617)" should read "(R-617,8)". At page 81, "R-86, p. 10" should read "R-10".

APPENDIX

Documents Lodged With The Court By Petitioner (and description of abbreviations)

1. One copy of the Record Appendix In the Court of Appeals for the Second Circuit. All "A" references in this brief are to that appendix. However, pages A-3 through A-7 therein are correlated with and match similarly numbered pages in the appendix to this Brief. Judge Motley's opinion can be found in either appendix at page numbers A-2 through A-8.
2. One copy of the Supplemental Record Appendix in the Court of Appeals which sets forth the Record on Appeal in the case of *Roskind v. Brown,* 285 N.Y.S.2d 410 (App. Div. 2d Dep't 1967) [on which the opinion below heavily relies]. See Brief Point 8., esp. 8C. The Roskind Record on Appeal is cited in this brief as RRA.
3. Item 3 consists of a grouping of documents, located in order, by their "R" numbers as they appear in the Index to the Record on Appeal from the United States District Court to the United States Court of Appeals for the Second Circuit. The copies lodged with this court are copies of copies taken at the United Stateds District Court and will in most instances bear extraneous markings because they were used as work papers. In any event any document cited in this brief with an R number is a part of the Record on Appeal regardless of whether a copy is lodged with this Court.
4. Copies of certain pages, cited RT, of the Replevin Hearing Transcript (R41 and 306).
5. A copy of Petitioner's personal copy of the Amended Complaint (without the Exhibits thereto)and setting forth Schaefer's *state* claims against EDS.
6. A copy of EDS's letter to the U.S. Court of Appeals dated October 26, 1979. [The 10/30/79 note in the lower right hand corner was made by an attorney in New York City who received it on my behalf].
7. A copy of Petitioner's personal copy of what became R-10.

Pages 1 & 2 of Opinion, U.S.D.C. S.D.N.Y., filed March 16, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DIVISION OF NEW YORK

THE F & M SCHAEFER CORPORATION and
THE F & M SCHAEFER BREWING COMPANY,
Plaintiffs,

-against-

ELECTRONIC DATA SYSTEMS CORPORATIONS
and E. D. SYSTEMS CORPORATION,
Defendents.

76 CIV. 3982
(CBM)
Closed
#48360

THOMAS R. NELIPOWITZ, ESQ,
Petitioner,

-against-

THOMAS K. CHRISTO, ESQ.,
ROBERT G. WATSON, ESQ.,
THE F & M SCHAEFER CORPORATION,
THE F & M SCHAEFER BREWING COMPANY
ELECTRONIC DATA SYSTEMS CORPORATION
and E. D. SYSTEM CORPORATION,
Respondents,

APPEARANCES

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CONSTANCE BAKER MOTLEY, D. J.

Opinion, U.S.D.C. S.D..N.Y. MARCH 16, 1979

Thomas R. Nelipowitz, an attorney, has brought his petition to enforce an attorney's lien under New York Judiciary Law, §475, on the proceeds of the settlement of the action, *F. & M. Schaeffer Corp. v. Electronic Data Systems, Corp., et al.*, 76 Civ. 3982. In a memorandum endorsement dated December 13, 1978 this court held it had jurisdiction to hear the petition. Since that date the parties have submitted affidavits and requests for rulings of law. The petition is now dismissed. Taking petitioner's allegations as true, he has failed to meet the requirements of a lien under §475.

The undisputed facts are as follows. Nelipowitz, an attorney practicing in New York State, was hired by Thomas K. Christo, who at the time had law offices in Boston, to work as "of counsel" to his firm. Nelipowitz' name appeared with the designation "of counsel" on Christo's firm's stationery throughout the relevant time period.

After Nelipowitz had started to work for Christo as of counsel, the F. & M. Schaeffer Corporation (Schaeffer) retained Christo's law firm to represent it in its action against Electronic Data Systems Corporation. The retainer agreement between Schaeffer and Christo stated it was retaining Christo and "such other attorneys as he may choose to associate with him". Nelipowitz did legal research for Christo on Schaeffer's case as well as on other cases being handled by the Christo firm.

Christo was not admitted to practice in New York State. Since Nelipowitz was admitted in New York, Christo asked him to sign the complaint and appear as attorney of record, which he did. Nelipowitz then moved the admission of Christo *pro hac vice.* Christo then appeared before this court throughout the protracted proceedings leading up to settlement. Nelipowitz contends that he met with various officials of Schaeffer and that they were aware he was working with Christo on the case and were aware that he was formally the attorney of record. Christo and Schaeffer dispute this. It is not disputed that Christo was in charge of the case and that Nelipowitz reported to Christo.

> Section 475 provides in part that:
> "... the attorney who appears for a party has a lien upon his client's cause of action..."

Nelipowitz contends that he is entitled to this statutory lien on the proceeeds recovered by Schaeffer because 1) he was the attorney of record; and 2) although not retained directly by Schaeffer, he was "of counsel" to the lawyer directly retained by Schaeffer and Schaeffer was aware of this arrangement.

The court finds that if Nelipowitz' allegations are proven he will not be able to enforce an attorney's lien under §475. To enforce an attorney's lien in New York State, the petitioner must not only show that he was attorney of record, but must also have been directly retained by the client. It is not sufficient to allege petitioner was "of counsel" to the retained attorney. *Roskind v. Brown,* 285 N.Y.S.2d 410 (App. Div. 2d Dep't 1967).

In *Roskind, supra,* plaintiffs hired a lawyer, Glazer, to prosecute a negligence action for them. Glazer then hired two lawyers, Blumberg and Lederberg, to act as both attorney of record and trial counsel. Blumberg and Lederberg were designated as "of counsel" to Glazer. They then prepared a complaint and negotiated a settlement offer from defendants which was rejected by plaintiffs. Plaintiffs then fired Glazer, Blumberg and Lederberg. It was disputed whether they were fired before or after the complaint was filed. Plaintiffs then hired a second lawyer who filed a second complaint. Glazer asserted an attorney's lien on plaintiff's cause of action. The court held that Glazer's statutory claim failed as he was not attorney of record. The court held that Glazer had a common law lien and he alone was responsible for the compensation of the attorneys of record, Blumberg and Lederberg.

> The court stated:
> "And determination of[Glazer's fee] . . . shall be dispositive of the rights of his associates [the attorneys of record], who were retained by him as of counsel and *to whom he, in our opinion, is solely responsible".*" at 412. (emphasis added)

Thus Nelipowitz, attorney of record but not retained directly by the client, cannot assert a statutory lien upon the client's recovery. Therefore his petition must be dismissed.

The allegation that Schaeffer approved Christo's use of Nelipowitz, who was already of counsel to Christo's firm does not change this result. Nelipowitz does not allege that he was directly hired by Schaeffer as co-counsel with Christo. Schaeffer hired Christo and approved his use of associates. The attorney's lien would run to Christo's law firm retained by the client and not to the associate of that firm. *Entertainment & Amusements of Ohio, Inc. v. Barnes*, 267 N.Y.S.2nd 359, 362 (Sup. Ct. 1966); See also *Friendland v. 601 W. 149 St., Inc.*, 223 N.Y.S.2d 885 (App. Div. 1st Dept. 1962).

The dismissal of Nelipowitz' petition is consistent with the purpose underlying the statutory lien which is to protect attorneys

> "against the knavery of their clients by disabling clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained."

In Re Maggio's Estate, 9 N.Y.S.2d 599, 603 (Sur. Ct. 1938; *In re Washington Sq. Slum Clearance,* 184 N.Y.S.2d 585, 590 Ct. of Appeals 1959). Here the client has paid the attorney whom it retained. It is an associate of the retained attorney who requests additional compensation from the client.

The dismissal of the petition is also consistent with the rule that trial counsel cannot recover from the client's proceeds even though the settlement or recovery for the client was obtained by the trial counsel's efforts. The rule is that the trial counsel can only proceed against the attorney of record who retained him. *In re Loomis*, 273 N.Y. 76 (1937); *Grennan v. Well Built Sales*, 231 N.Y.S.2d 625 (Sup. Ct. 1962); *Kiser v. Bailey*, 400 N.Y.S.2ds 312, 315 (Civ. Ct. 1977).

Thus Nelipowitz has failed to meet the second requirement imposed by the New York courts for enforcement of a statutory attorney's lien, that he be directly retained by the client and not merely of counsel to the retained attorney.

Therefore Nelipowitz' petition is dismissed without prejudice to litigation of his claims for compensation against Christo in other fora.

Dated: New York, New York
March 16, 1979

CONSTANCE BAKER MOTLEY
U.S.D.J.

ENDORSEMENT TO OPINION, U.S.D.C. S.D.N.Y., April 23, 1979

THE F. & M. Schaeffer Corp., et al ., v. Electronic Data Systems Corp. et al, 76 Civ. 3982 (Closed)

ENDORSEMENT

Petitioner Nelipowitz has moved to amend this court's opinion of March 16, 1979 in which it dismissed petitioner's petition for failure to satisfy the requirements of a statutory attorney's lien. Petitioner also moved ex parte that this court set aside its earlier opinion. Those motions are denied, Petitioner has failed to present any new arguments of substance. Petitioner's request of March 28 that the court direct the plaintiffs to answer certain questions is denied. Petitioner's request of April 10, 1979 that the court make certain findings of fact is denied. The court finds these requests to be without merit.

Dated: April 23, 1979
New York, New York

SO ORDERED

CONSTANCE BAKER MOTLEY, U.S.D.J.

Opinion, U.S.C.A for the Second Circuit, November 2, 1979

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed substantially on the opinion of Judge Motley below. Signed by Thomas J. Meskill, U.S.C.J.; Amalya L. Kearse, U.S.C.J. and John F. Dooling, U.S.D.J. (of the E.D. of N.Y. sitting by designation).

Order U.S.C.A. Second Circuit December 18, 1979

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eighteenth day of December, one thousand nine hundred and seventy nine.

* * * *

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed by THOMAS R. NELIPOWITZ, ESQ,. petitioner-appellant *pro se*, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED. Signed Irving R. Kaufmanm Chief Judge.

Order, United States Court of Appeals
December 18, 1979

A petition for rehearing having been filed herein by Thomas R. Nelipowitz, Esq. petitioner-appellant *pro se*. Upon consideration thereof, it is Ordered that said petition be and hereby is denied.
Signed A. Daniel Fusaro, Clerk.

Order, U.S.C.A. for the Second Circuit,
March 17, 1980

It is hereby ordered that the motion made herein by appellant by notice of motion dated January 2, 1980 for leave to file a petition for reconsideration *en banc* be and it hereby is denied.
Signed Thomas J. Meskil and Amalya L. Kearse.

Order,U.S.C.A for the Second Circuit, May 5, 1980

It is hereby ordered that the motion made herein for the pro se appellant by notice of motion dated March 11 1980 to recall the mandate and consider appellant's supplemental brief and motion for leave to file petition for reconsideration en banc be and it hereby is denied.

Signed Thomas J. Meskill, U.S.C.J., Amalya L.Kearse, U.S.C.J. and John F. Dooling, U.S.D.J.

Notice Of & Motion For Leave To File Supplementary Brief [by Petitioner]
December 14, 1979

**** Relief Requested: Permission To File 3 page Supplemental Brief. **** The erroneous Opinion below was written on March 16, 1979 and claims an out-of-state law firm can hold a New York statutory lien. I have just discovered an important New York case of first impression decided two months after the Opinion below which holds an out-of-state law firm may not appear (and thus may not hold a New York statutory lien). I did not discover this case until four weeks after the presently pending Petition For Rehearing was filed. * * * * The case of Rosenberg v. Johns Manville Sales Corporation, 416 N.Y.S.2d 708 (Sup. Ct. N.Y. Co. 1979) directly affects the case at bar. Twenty five copies of the Supplemental Brief are enclosed.

Order U.S.C.A. December 26, 1979

IT IS HEREBY ORDERED that the motion for leave to file a supplemental brief be and it hereby is granted. Signed Thomas J. Meskill.

Constitutional Provisions, Statutes and Rules

Constitutional Provision

U.S. Constitution Amendment XIV. *— Citzenship; Privileges and Immunities; Due Process; Equal Protection;____*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

FEDERAL STATUTES:

28 U.S.C.A. 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ****

28 U.S.C.A. 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

28 U.S. C A. 1652. State Laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

NEW YORK STATUTES

N.Y. Jud. L. Sec. 470. Attorneys having offices in this state may reside in adjoining state.

A person regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state.

N.Y. Jud. L. Sec. 474. Compensation of attorney or counsellor

The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law ....

N.Y. Jud. L. Sec. 475. Attorneys' lien in action, special or other proceeding

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

N.Y. Jud. L. Sec. 478. Practicing or appearing as attorney at law without being admitted and registered

It shall be unlawful for any natural person to practice or appear as an attorney-at-law or an attorney and counselor-at-law . . . in a court of record of this state or in any court of the city of New York . . . or to hold himself out to the public as being entitled to practice law . . . or to assume, use, or advertise the title of lawyer, . . . in any language, in such manner as to convey the impression that he is a legal practitioner of law or in any manner to advertise that he either alone or together with any other persons or person has, owns, conducts or maintains a law office . . . of any kind for the practice of law, without first having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath and without having subscribed and taken the oath or affirmation required by section four hundred sixty-eight of the judiciary law and filed the same in the office of the clerk of the court of appeals as required by said section. Provided, however, that nothing in this section shall be held to apply [to the categories of persons identified; inapplicable here].

N.Y. Jud. L. Sec. 484. None but attorneys to practice in state

No natural person shall ask or receive, directly or indirectly, compensation for appearing for a person other than himself as attorney in any court . . . or for preparing . . . pleadinds of any kind in any action brought before any court of record in this state unless he has been been regularly admitted to practice, as an attorney or counselor, in the courts of record of the state; but nothing in this section shall apply [to the categories of persons identified; inapplicable here .]

N.Y. Jud. L. Sec. 491. Sharing of compensation by attorneys [with non-attorneys] prohibited

1. It shall be unwlaful for any person . . . to divide . . . fee . . . received by such attorney . . . for the purpose . . . of bringing an action . . . . *But this section does not apply to an agreement between attorneys and counsellors-at-law to divide between themselves the compensation to be received.*

General Rules of the United States District Courts for the Southern and Eastern Districts of New York

Rule 3(c).

A member in good standing of the bar of any state, or of any United States district court, may upon motion be permitted to argue or try a particular cause in whole or in part as counsel or advocate. Only an attorney or proctor of this court may enter apppearances for parties, sign stipulations or receive payments upon judgments, decrees or orders.

Rule 4(a).

No member of the bar of this court not having an office within the Southern or Eastern District of New York shall appear as attorney or proctor of record in any cause without designating with his initial notice or pleading a member of the bar of either district having an office within the Southern or Eastern District of New York upon whom service of papers may be made.

Rule 4(c)

An attorney who has appeared as attorney of record for a party may be relieved or displaced only by order of the Court and may not withdraw from a case without leave of the Court granted by order. (Southern District: Such an order may be granted only upon a showing by affidavit of satisfactory reasons for withdrawal or displacement and the posture of the case, including its position, if any, on the calendar.)

Disciplinary Rules:

DR 2-102. Professional Notices, Letterheads, Offices, and Law Lists

(A) A lawyer or law firm shall not use ... announcement cards, ... letterheads ... except that the following may be used....

* * * *

(A)(4) ... A lawyer may be designated "of counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate....

* * * *

DR 2-107. Division of Fees Among Lawyers

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

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